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No. 828

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

R. LAWRENCE SIEGEL,

and

HADASSAH R. SHAPIRO,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. The facts relied on to establish materiality, as an element of both perjury and obstructing justice, were sharply disputed. The District Court, in seeking to follow the rule of the Second Circuit and this Court's dictum in *Sinclair v. United States*, did not withhold judgment on materiality until all the proof had been received, did not receive all the relevant proof, did not submit this issue of fact to the jury. It is believed that this raises sweeping questions of procedural law, substantive due process, and the Constitutional right to a jury trial upon all elements of the crimes charged, upon which this Court has never ruled	16
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that the test of materiality is whether it appears by the terms of the question that the answer cannot be material; unless it does so appear, materiality must be deemed established for all purposes; and the fact that the accused state *immaterial* matter which they did not believe to be true, or that the true facts called for by the question were likewise *immaterial*, does not prevent a finding that material matter was stated in the answer. It is submitted such ground presents a hitherto unprecedented and radically unsound proposition, which ignores the text of the perjury statute and substitutes what is conceivably intellectually (that there *can* be a material answer to a certain question) for common law evidence of actual materiality 24

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charges against its own staff. When Siegel admitted having given false and erroneous answers about inconsequential aspects of his own aide memoire, the Assistant U. S. Attorney returned petitioners to the grand jury to record and enlarge upon these admissions, and thereby justify the Assistant U. S. Attorney in suppressing Siegel's testimony from Judge DIMOCK on the basis that Siegel was discredited. This use of the grand jury to discredit a witness whose evidence might otherwise embarrass the U. S. Attorney's position in a pending litigation, and the subsequent carrying out of the threat that Siegel would be prosecuted unless he changed his testimony, which was true and was never changed, deprived petitioners of due process of law. The use of the grand jury testimony, recorded to discredit, oppress, and harass petitioners, in prosecuting them for perjury and obstruction of justice, violated their Constitutional rights 31

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V. In this trial for obstruction of justice and perjury it was reversible error for the trial court: (1) to refuse to charge that "'corruptly' means for an improper motive" and to instruct the jury that petitioners' motive to protect clients from damaging notoriety was irrelevant on the issue of intent; (2) to charge that the accused's admissions of false grand jury testimony were "equivalent to a plea of guilty" on the perjury counts, which created incurable prejudice even though in a supplementary charge the trial judge undertook to explain his statement, isolating the concepts of "intent and knowledge" from his previous conclusion that a "plea of guilty" had in effect been entered; (3) to refuse to give additional instructions requested by the trial jury during its deliberations 41

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R. LAWRENCE SIEGEL,

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming their convictions for corruptly obstructing justice or corruptly endeavoring to obstruct justice (under Title 18, United States Code, §1503) and for wilful perjury (under Title 18, United States Code, §1621).*

*As a result of the perjury convictions, petitioners, attorneys, were automatically disbarred pursuant to §90(4) of the New York Judiciary Law without a hearing. To test the constitutionality of said statute petitioners at bar previously filed (on March 14, 1959 in this Court) a Statement as to Jurisdiction "In the Matters of Rubin L. Siegel (also known as R. Lawrence Siegel) and Hadassah R. Shapiro, attorneys, Appellants, against The Association of the Bar of the City of New York, Appellee" (No. 773, October Term, 1958).

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit has not yet been reported; a copy thereof is Appendix A hereto. The opinion of the District Court (per BRYAN, J.) on a motion to dismiss the indictment is reported at 152 F. Supp. 370; a copy thereof is Appendix B hereto. The opinion of the District Court (per DAWSON, J.) on a motion for a bill of particulars was not reported; a copy thereof is Appendix C hereto. The opinion of the District Court (per CLANCY, J.) on a preliminary motion to dismiss counts of the indictment and for other relief was not reported; a copy thereof is Appendix D hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was made and entered on February 17, 1959. No order was sought or made respecting a rehearing. Petitioners' time to petition for certiorari was extended to and including April 10, 1959 by order of Mr. Justice HARLAN dated March 18, 1959. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, §1254 (1).

Questions Presented

1. Whether the crime of perjury as defined in 18 U. S. Code §1621 can be found to have been established when the proof shows that the accused stated *immaterial* matter which he did not believe to be true, and that the true facts called for by the question were also *immaterial*, on the ground that it is *conceivable* that there could have been an answer to the question which would have been material.

2. Whether in a prosecution by jury trial the court can withdraw from the jury the issue of materiality as an element in the crimes of perjury and obstruction of justice, when the facts on which the prosecution relies to show materiality are in issue, without depriving the accused of the constitutional right to trial upon criminal charges by a jury.

3. Whether in a prosecution by jury trial for perjury and obstruction of justice, in which there exists a substantial dispute as to the facts upon which the prosecution relies to show materiality, the court may decline to receive defense evidence tending to establish immateriality upon the ground that the issue is for determination by the court.

4. Whether the court is required to find that materiality is established by proof beyond a reasonable doubt before instructing the jury that the subject matter is material, when a substantial issue of fact as to materiality is presented in a prosecution by jury trial for perjury and obstruction of justice, in which the court declines to submit proffered evidence of immateriality to the jury on the ground that materiality as an element in these crimes is for determination by the court.

5. Whether in a situation in which the office of the United States Attorney is facing charges and seeking to defend itself, it is an abuse of process amounting to denial of constitutional rights for the United States Attorney to call a citizen before a federal grand jury for the purpose of discrediting his evidence which might otherwise have embarrassed the position of the United States Attorney in meeting the said charges, and to threaten that if the citizen does not give the evidence desired by the United States Attorney he will be indicted and, when he does not do so, to indict and prosecute him for perjury and obstruction of justice.

6. Whether the right of the accused to a fair and impartial trial upon criminal charges by a jury as guaranteed by Article III, Section 2, Clause 3 of the Constitution and the Fifth and Sixth Amendments is violated by statements of the prosecutor in summation to the jury that the actions of the accused were motivated by his participation in some undisclosed way in a conspiracy to obtain the recantation of a witness whose testimony had resulted in the criminal conviction of a number of Communists, when the same prosecutor admits in open court following the conviction of the accused that such had never been the Government's contention and that there was no evidence in the record to support any such inference.

7. Whether the trial court committed error in its charges to the jury and refusals to charge, and in its denial of the jury's requests for additional instructions.

Constitutional Provisions Involved

The following provisions of the United States Constitution are involved:

1. Article III, Section 2, clause 3 of the Constitution reads:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

2. The Fifth Amendment reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in-

dictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. The Sixth Amendment reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statutory Provisions Involved

The following statutes are involved:

1. 18 U. S. C. §1503 (62 Stat. 769) reads as follows:

"§1503. Influencing or injuring officer, juror or witness generally

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or

officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

2. 18 U. S. C. (1621 (62 Stat. 773) reads as follows:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Summary of Indictment

The indictment was in twelve counts, all relating to informal memoranda or aide memoire of petitioner Siegel's conversations with one Harvey M. Matusow, in 1954, or stenographic notes.

Petitioners were *acquitted* on Counts I, II, and VI (SM 3207). These three counts were as follows: Count I charged a conspiracy to obstruct the due administration of justice. Count II charged petitioners jointly with influencing Mary Manna to destroy her notes of an April 21, 1954 conversation between Siegel and Matusow. Count VI charged that on or about March 20, 1955 petitioners jointly created stenographic notes to submit to the grand jury for June 18 and November 3, 1954 conversations, as those from which Miss Shapiro typed contemporaneous memoranda. The acts alleged in these three counts include all the acts upon which the additional nine counts rested.

Petitioners were jointly *convicted* on Counts III, IV, and V, which charged that petitioners corruptly endeavored to or did obstruct justice, by having Siegel give the grand jury five memoranda (bearing date April 21, April 29, May 3, June 18, November 3, 1954) on conversations with Matusow which were not the originals, and with destroying the originals and notes for the April 21, 1954 memo, to prevent their production before the grand jury. These counts did not allege that the original memoranda were material to the grand jury investigation or that petitioners knew they were material, nor did the indictment state any respects in which the retyped memoranda differed from the originals.

Counts VII to X charged Siegel alone with grand jury perjury on two occasions. In submitting the case to

the jury, the court directed *acquittals* on two answers cited in Count VIII (204a-205a) and one answer cited in Count IX (206a). The jury *convicted* Siegel on Counts VII to X.

Counts XI and XII charged Miss Shapiro alone with perjury. Count XI cited seven answers, on four of which the trial court in its charge directed *acquittals* (208a). The jury *convicted* on these two counts. The perjury counts did not specify which quoted answers were false or allege the truth. Only excerpts of questions and answers appear in several instances (Counts VII, VIII, IX, XI). In each perjury count there is an allegation of materiality but no facts to show materiality. *No statement about Matusow was alleged to be false.*

All counts of the indictment incorporated by reference paragraph 3 of Count I, which defined the grand jury's investigation as follows:

> "• • • • following the filing of said affidavits[1] in court, a Grand Jury of the United States, duly impaneled and sworn in and for the United States District Court for the Southern District of New York, on February 8, 1955, began conducting an investigation to determine, among other things, whether the said Harvey M. Matusow had committed perjury during his testimony in the Flynn case,[2] to determine whether, if he had committed perjury during said testimony, any representative of the United States Government had knowledge of the same,[3] to determine whether he had

[1] Affidavits by Harvey M. Matusow recanting testimony he had given in *United States* v. *Flynn*, a Smith Act prosecution, and *United States* v. *Jencks*, a prosecution for filing a false non-Communist affidavit.

[2] Cert. to review conviction denied, 348 U. S. 909, 956.

[3] Matusow's recanting affidavit alleged that this was Roy M. Cohn.

committed perjury during his testimony in the Jencks case,[1] to determine whether he had committed perjury by executing said affidavit concerning his testimony in the Jencks case, and to determine whether there existed a conspiracy to influence the said Harvey M. Matusow to commit perjury and obstruct justice by executing either or both of said affidavits."

STATEMENT OF THE CASE*

In 1954 when petitioner Siegel was counsel to The Nation he received several visits from one Harvey M. Matusow, who had been to The Nation and was seeking a publisher for his confessions which later came out under the title "False Witness."

Petitioner Miss Shapiro was a lawyer associated with Siegel. Following Matusow's visits Siegel gave rough notes for some seven memoranda to Miss Shapiro, who typed memoranda for the files and threw away her notes. Siegel also dictated one memo to his secretary, Mary Manna. Mrs. Manna's notes were preserved in an ordinary stenographic notebook.

Three clients of Siegel's, either accidentally or through Matusow's intrusions, observed Matusow in the company of Siegel, and this was recorded in the memos for the files. These clients were Michael Shore, Col. Lewis L. Bredin and Miss Gloria Swanson.

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[1] Conviction reversed by this Court, 353 U. S. 657.

* References to the printed appendix before the Court of Appeals are made herein by a page number followed by the letter "a," *e.g.* "160a." References to the typewritten stenographers' minutes of the trial, certified as the record herein, are "SM" followed by the stenographer's page number. References to the appendices to this petition appear as (App. A, B [etc.], with the page number).

Siegel last heard from Matusow November 3, 1954, when Matusow had come to New York from the southwest at the expense of the publishing company which ultimately brought out "False Witness." In this interview Matusow referred to his telephone conversation with Gloria Swanson in Dallas and a reference thereto was put in Siegel's memo.

Some two months later in January, 1955, Matusow recanted his testimony in two Communist trials and the defendants in *United States* v. *Flynn* moved upon his affidavit for a new trial. Just as the motion came on before Hon. EDWARD J. DIMOCK a grand jury in the Southern District of New York commenced to investigate to determine which had been perjurious, Matusow's trial testimony or his recantation, whether there existed a conspiracy to influence him to commit perjury, and whether, if his original *Flynn* testimony had been perjurious, *"any representative of the United States Government had knowledge of the same."*

Upon learning that in 1954 Matusow had telephoned Siegel from Dallas the Government subpoenaed him to appear before the grand jury to testify and produce all "documents" touching Matusow.* On March 3, 1955 Siegel appeared and swore to all his conversations with Matusow, mentioning the fact of the latter's visit on April 21, 1954 to the apartment of Gloria Swanson where still another client of Siegel's was present (he did not and was not asked to identify the second client, who was Colonel Bredin). He

* Long before he recanted, Matusow had talked about his role as a Government witness with numerous persons, of whom Siegel was one. There is no basis in the record for the statement in the opinion of the Court of Appeals (App. A, p. 3) that Siegel had been subpoenaed before the grand jury "because it was known that Matusow had talked with him *about his recantation*" (emphasis added); no evidence was offered of any conversation in which Matusow told Siegel—in words or in substance—that Matusow would ever consider recanting his testimony as a Government witness.

testified that he had no documents but volunteered that he had made rough memoranda of the conversations which would be in his files. The grand jury instructed Siegel that he need return for further testimony only if his examination of the memos should develop something strongly at variance with the recollection to which he testified that day.

Examination of the memos disclosed nothing which led Siegel to correct his testimony before the grand jury (he had already examined several of them before testifying March 3); but he did discover the names of the three clients mentioned in three memos, and that two other memos had been typewritten in very rough form.

Understanding from the Assistant U. S. Attorneys that the Government now wanted him as a witness against the *Flynn* defendants before Judge DIMOCK, Siegel had Miss Shapiro help him prepare a chronological memorandum of all Matusow conversations. After they prepared the chronological memorandum Siegel and Miss Shapiro revised five of the eight memos found in the files to eliminate names of clients from three and to make two others more presentable in form. Siegel contemplated his cross-examination by Harry Sacher, Esq., on behalf of the moving defendants before Judge DIMOCK. Publication of the facts that Col. Bredin was in Miss Swanson's apartment, where Matusow had intruded in quest of Siegel, could not help the Government. It could damage Colonel Bredin, whose wife had obtained a large judgment against him in another state; Siegel represented Bredin in extensive matrimonial litigations with Mrs. Bredin. Notoriety could be ruinous to Miss Swanson, whose relationship with Colonel Bredin (carried on at her apartment) the latter regarded as a matter of his own privacy or personal secrecy; she had a contract with a dress company containing a morals clause permitting cancellation in case of damage to her good name or reputation.

Michael Shore had an interest in a mechanical device for parking automobiles, in which Miss Swanson was also interested. In 1954 Shore had been involved in a bankruptcy proceeding in Chicago, which continued into 1955; at which time public disclosure of his presence in New York discussing a business enterprise might have exposed him to an action.

When Thomas A. Bolan, a young Assistant U. S. Attorney, received the chronological memorandum from Siegel and studied it he realized that Siegel's testimony would help the *Flynn* defendants more than the Government; Siegel had made clear to the grand jury in his March 3 testimony that Matusow had confessed to Siegel as early as May, 1954, the giving of false testimony at trials, but evidently Bolan did not absorb the full significance of this until he read the chronological memorandum. At the trial Bolan testified that even then he saw it as his duty to present the evidence to Judge DIMOCK; but what he did was to set about having the grand jury investigate whether the chronological memorandum truly reflected Siegel's memos of his talks with Matusow.

Siegel was recalled as a grand jury witness March 17, at which time he produced five revised memos and three originals, and testified that all were as originally dictated. Three of the memos identified to the grand jury March 17 were in their original condition as typed in 1954; these contained such information as Matusow's having applied to the Soviet Union for a visa in May, 1954 and Matusow's position in a controversy with Bishop Oxnam over the question whether Matusow had lied in testimony to a Congressional committee.

Following Siegel's March 17 grand jury testimony when he falsely identified three revised memos as being the originals, Bolan informed petitioners that he would want the persons to whom Siegel had dictated the stenographic

notes originally to bring them to the grand jury on March 21. Miss Shapiro promised to produce stenographic notes, not remembering that her own notes (which were incomplete anyway) had been destroyed at the outset. She succeeded in finding Mary Manna's notebook with the shorthand notes for the meeting of April 21 at which Matusow invaded Miss Swanson's apartment and found Colonel Bredin there. Siegel, Miss Shapiro and Mary Manna held a meeting at which Mary Manna wrote in her book the stenographic outlines for the words of the revised April 21 memo; petitioners then tore up the original Manna notes. Using loose sheets, Miss Shapiro herself wrote partial stenographic notes for three other memos.

On March 21 Miss Shapiro appeared before the grand jury and identified as originals and delivered the stenographic notes so developed.

After examining the notebook containing the inserted Manna notes, Bolan asked Siegel whether he did not wish to correct some of his grand jury testimony. Siegel and Miss Shapiro consulted former Judge SIMON H. RIFKIND and upon his advice telegraphed the U. S. Attorney, Judge LUMBARD, for an appointment to straighten out the tangled web.

The following morning, March 22, 1955, Siegel went to the Court House to correct his grand jury testimony but, Judge LUMBARD being out of the state, Siegel was again confronted by Bolan. Bolan did not take him before the grand jury but subjected him to seven hours of continuous examination *in camera* by Bolan and other Government counsel in rotation, who pressed Siegel to reveal supposed ties to Matusow, which did not exist. Siegel did not get the opportunity to correct his false answers to the grand jury until April 4; the grilling of March 22nd had been followed by illness in bed for twelve days.

From the moment when they voluntarily admitted suppressing the changes in the memos, and at all times, both petitioners attributed their actions to protecting their clients from notoriety—professing throughout their belief that the Canons of Professional Ethics demanded this until petitioners were able to procure waivers of the attorney-client privilege. When on March 22 Miss Shapiro recanted her false testimony of March 21 and volunteered that the memos had been revised to take out clients' names, she still withheld the deleted names and went to the brink of contempt before District Judge MURPHY; she faced commitment (which was averted by the belated arrival of the last waiver) rather than disclose the names.

Siegel himself at his first grand jury appearance had revealed Miss Swanson's presence during one Matusow visit; but it was her alliance with Colonel Bredin which would transpire from disclosing Bredin's presence at her apartment on that same Matusow visit, which would damage both clients; Siegel never coupled their names until both had waived the privilege. Shore was inaccessible for some time and was the last of the three to waive and have his name disclosed.

The confessions that the memos were revised and the later disclosure of the deleted names (followed by grand jury appearances of each of the three clients) all occurred within ten days. This did not satisfy Assistant U. S. Attorney Bolan, who persisted for the ensuing three months, both before the grand jury and, petitioners offered to prove, in conferences with petitioners' attorneys, with the threat of indictments unless something more were told. The Government never showed that there was anything more to tell. At sentencing District Judge MCGOHEY emphasized that petitioners' testimony as to what was in their minds in revising the memos stood uncontradicted.

At the trial Bolan, who had now associated himself in private practice with Roy M. Cohn, the former member of the U. S. Attorney's staff who had been accused in Matusow's recantation, was a prosecution witness before Judge McGohey and the jury. Bolan had been the Assistant U. S. Attorney who successfully prosecuted Matusow for perjury before Judge McGohey in 1956. Bolan had assisted the Government in preparing for trial the prosecution of these petitioners against whom he was a witness. In a colloquy outside the jury's hearing Judge McGohey himself characterized part of Bolan's testimony against these petitioners as "really in the nature of a summation" (SM 1679).

When the Assistant U. S. Attorney, Mr. Kramer, came to make the official summation to the jury, he said:—

> "That reason [the defense explanation that they had been concerned over Siegel's clients] was developed after the fat was in the fire. That [sic] something that they have *now* dreamt up and they dreamt up in the days following March 20th to excuse an inexcusable act" (SM 2956). (Emphasis added.)

Mr. Kramer then went on to impute to petitioners as an explanation for Siegel's actions the "possible reason, that his contacts with Matusow were not as innocent as he would now have you believe" (SM 2973). Then he went even further and suggested that Siegel belonged to a group to which Matusow had been useful, and that Matusow had fallen from favor with this group by 1955 when Siegel testified before the grand jury.

Thirty days later, with the verdict of guilty before the court, Mr. Kramer acknowledged in open court to Judge McGohey that the Government had no basis for contending and did not contend that petitioners had any motive to hide any possible connection with Matusow or any persons

conspiring to help Matusow recant; and that on the contrary the record "shows complete absence of any such intention on the part of either of these defendants • • • ." (SM 3236-37.)

The foregoing undertakes to comply with Rule 23 (1)(e) of this Court's Rules requiring that the petition contain a concise statement of the case containing the material facts. In view of the length of the record—over 3300 pages without exhibits—petitioners have taken the liberty of annexing as Exhibit E a "Summary of Trial Evidence With Record References and Essential Quotations."

REASONS FOR GRANTING THE WRIT

I.

The facts relied on to establish materiality, as an element of both perjury and obstructing justice, were sharply disputed. The District Court, in seeking to follow the rule of the Second Circuit and this Court's dictum in *Sinclair* v. *United States*, did not withhold judgment on materiality until all the proof had been received, did not receive all the relevant proof, did not submit this issue of fact to the jury. It is believed that this raises sweeping questions of procedural law, substantive due process, and the Constitutional right to a jury trial upon all elements of the crimes charged, upon which this Court has never ruled.

The Constitutional guaranty of a jury trial to those accused of crime (U. S. Constitution, Art. III, §2, Cl. 3; Amendments V and VI) ordinarily prohibits federal trial judges in criminal cases from withdrawing issues from the jury upon which there is any evidence. The right guaranteed is the right to a jury trial on each essential element of the crime charged, even when the prosecution

evidence stands uncontroverted: *Bollenbach* v. *United States*, 326 U. S. 607; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 18; *Ex parte Milligan*, 4 Wall. 2-142; *United Brotherhood* v. *United States*, 330 U. S. 395, 408.

When an essential element of the crime is not submitted to the jury in a perjury case the conviction must be reversed because due process requires that "all the elements of the crime charged shall be proved beyond a reasonable doubt" (*Christoffel* v. *United States*, 338 U. S. 84, 89—a perjury prosecution wherein the deficient proof related to the presence of a competent tribunal).

In this case the Government's showing of materiality was testimony by the grand jury foreman and two Assistant U. S. Attorneys that the grand jury wanted to interview all who had conversed with Matusow. The defense tried to show that this testimony was false in fact—both by cross-examining the Government witnesses and by showing that Morris L. Ernst had sought and been denied the opportunity to appear before this grand jury and recount his talks with Matusow. Curtailment of cross-examination and exclusion of the proffered counter-testimony deprived petitioners of a full presentation on this fact issue, which was substantial. Withdrawal of this issue from the jury left petitioners with very little to argue at the end of the case: petitioners had admitted the falsity of certain answers as to whether the aide-memoire and notes delivered to the grand jury were as originally dictated; had admitted that when these false statements were made under oath petitioners did not believe them to be true; and had admitted that the names of Gloria Swanson, Lewis L. Bredin and Michael Shore had been deleted in retyping, and that each of these persons had seen Matusow and spoken casually with him.

The only occasions for the trial therefore were the false accusation that petitioners had entered into a conspiracy (of which the jury acquitted them), and the dispute as to materiality.

To rule *before even hearing the defense case*, as the District Judge did (160a), that "The Grand Jury was attempting to find out everybody that had been in touch with Matusow and these were people who were in touch with him or were present at some conversation," and to instruct the jury "as a matter of law" that "the matter concerning which they testified • • • was material to the Grand Jury's investigation" (199a) was to leave the jury with no alternative but to find petitioners guilty as it did—albeit reluctantly, it would seem from the eleven hours of deliberation and the repeated requests for the minutes of trial, for the text of the Court's charge, and for additional instructions (277a-290a).

To put it another way, the District Court's application of this Court's dictum in *Sinclair* v. *United States*, 279 U. S. 263, 298 and of the rule in *Carroll* v. *United States*, 16 F. 2d 951, that materiality is for the court, amounted in the last analysis to direction of a verdict of guilty. Plainly it would seem that this Court would serve the interests of justice by closely scrutinizing in such a case the application of its own observations in *Sinclair*.

If, as the *Carroll* rule goes, materiality "was a question of law for the court, and was not for the jury" (*Carroll* v. *United States*, 16 F. 2d 951 at 954), it was not the kind of question of law that is answerable by research in the library; when materiality is at issue the *Carroll* rule must mean that the tribunal shall inform itself with competent evidence; were it otherwise, materiality would be judged simply by reading the question in its context, as when the judge rules, upon an objection to a question, that it is technically improper or calls for inadmissible evidence.

This is not the statutory criterion in perjury, where materiality turns on what the *witness "states"*; and the Government conceded in the Court of Appeals that what applies to materiality on the perjury counts is equally applicable to it on the obstruction counts (see Court of Appeals opinion, App. A, p. 6).

The trial court mistakenly excluded evidence because materiality was for the court and he would not allow the jury to hear evidence on an issue which was for the court. But since no evidence was received in chambers or with the jury dismissed; and Judge McGohey never suggested such a procedure, the end result was that he would not let the jury hear the evidence, the court did not hear it before making his determination of materiality, and so there was no adversary proceeding whatever on the subject of materiality.

It is difficult to say whether Judge McGohey treated materiality, an element of the crime of perjury, just as though he were ruling upon materiality for purposes of admitting evidence. In ruling on objections to evidence the court considers the question or exhibit in the light of the issues and the proof up to that point in the case. No tribunal deciding materiality in a criminal case should arrive at a view of its merits until all the proofs have been received. But Judge McGohey's decision that the element of materiality was established came early in the case and from that point on he excluded defense proof on the matter.

This was a misapplication of the *Carroll* rule that the court determines the element of materiality in a trial for perjury. Even under the *Carroll* rule credibility ought to be for the jury, but Judge McGohey did not submit to the jurors the credibility of the Government witnesses on materiality.

Since the administration of the *Carroll* rule in this case deprived petitioners of any trial upon these elements of the crimes charged, it may be unnecessary to consider whether *Carroll* can withstand constitutional scrutiny. Before *Carroll* there was no federal decision anywhere that a defendant in a perjury trial could not have the jury pass upon every element of the offense including materiality. In England it had taken an act of Parliament to make materiality a court-decided issue. Commentators before *Carroll*, advocating a like rule here, may have overlooked one of the significant differences between Great Britain and America—our written Constitution—which guarantees to every defendant in a criminal case the right to trial by jury.

The Court of Appeals which has now affirmed petitioners' conviction acknowledged that the appeals turned upon whether the testimony was "material" to the grand jury's investigation of Matusow's recantation (App. A, p. 5) and ruled that "'materiality' is always a question for the court" (*idem*, p. 6).

Sinclair v. *United States*, 279 U. S. 263, 298, was the only opinion of this Court cited for the foregoing proposition.

Sinclair was not a perjury case at all, but a prosecution of Harry F. Sinclair for contempt for his refusal to answer Senator Walsh's question "concerning a contract that you made • • • touching the Teapot Dome" (279 U. S. at 288). 2 U. S. C. §192, applied to the witness in *Sinclair*, punishes refusal "to answer any question pertinent to the question under inquiry." In holding that the question of pertinency was "rightly decided by the court as one of law" (279 U. S. at 298), this Court's opinion observed (*ibid.*): "It did not depend upon the probative value of evidence." It is respectfully submitted that what this Court went on to say in its *Sinclair* opinion, equating pertinency

to relevancy at a trial and to materiality of false testimony charged as perjury, for which *Carroll* v. *United States* was cited, could not be followed in a prosecution for perjury without violating the Constitutional rights of the accused.*

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* The *Sinclair* dictum, likening the rule in contempt to the rule in perjury, had been invited by distinguished special counsel to the Government; at page 94 of their brief to this Court they characterized appellant Sinclair's argument that pertinency of the questions should have been left to the jury as "contrary to the general principles of criminal law." They then argued:

> "For example, almost all perjury statutes make the materiality of the alleged false testimony a substantive part of the offense. The courts have held without exception in a great many cases that the question of the materiality of the alleged false testimony is one of law for the court, and that it is error for the court to submit the question to the jury."

For the foregoing proposition was cited *Cothran* v. *State*, an 1860 decision of Mississippi (39 Miss. 541), representing the earlier American view which followed that branch of English case law holding that materiality was for the court. English decisions were split on the point. 1 Russell on *Crime* 308-309 (10th ed. [1950]). In 1911 England settled the dispute and with the Perjury Act of that year (1 & 2 Geo. V, c. 6 §1[6]) legislated a requirement that materiality be determined by the court.

It was the Perjury Act of 1911 and the English cases it adopted that the U. S. Attorney had cited in his brief to the Second Circuit in *Carroll* v. *United States*; and he added *Cothran* v. *State* and a scattering of other state decisions in this country to the same effect, the only federal decision cited being *United States* v. *Singleton*, 54 Fed. 488, an 1892 decision of the Southern District of Alabama on demurrer (Brief of the U. S. Attorney to United States Circuit Court of Appeals for the Second Circuit, pp. 37-38). The U. S. Attorney carefully informed the court of the decision of Lord Campbell, *C.J.*, in *Regina* v. *Lavey*, 3 Carr & Kir. 26, holding that materiality in perjury presents an issue for the jury.

England could legislate the element of materiality into a "question of law" by the Perjury Act. This deletes the element of materiality from the crime of perjury, at least so far as the jury is concerned. A revision of the New York perjury law to the same end was recommended by the New York Law Revision Commission in 1929 but not adopted (N. Y. Law Rev. Comm. Report, Recommendations and Studies, 1939, p. 308). The total elimination of the requirement of materiality as an element of perjury, and the substitution of false swearing statutes, has also been proposed in

It is well established that the Constitutionally guaranteed right of jury trial is not available in contempt proceedings generally (*Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31), or in contempt of court cases (*Green* v. *United States*, 356 U. S. 165); it exists in certain cases involving contempts of courts and others by express legislative provision. 18 U. S. C. §3691.

When the right to jury trial enures to a criminal accused, he is entitled to have the jury determine credibility (*e.g.* in the instant case, that of Government witnesses Collier,

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this country. See, New York Law Revision Commission Report, Recommendations and Studies, 1935, page 318; and the recent proposal by U. S. Senator Kenneth B. Keating, New York Daily Mirror, March 25, 1959, page 8. The influence of the English Perjury Act upon American judicial thinking had been profound until the subject was re-examined in the light of our Constitutional guarantees in *People* v. *Clemente*, 309 N. Y. 890, affirming 285 App. Div. 258, where Presiding Justice DAVID W. PECK wrote:

"While as lawyers we are accustomed to thinking of materiality as a matter for judicial ruling, there is nothing in the nature or quality of materiality which makes it essentially a legal concept or removes it from the ken of a layman's discernment and determination. The word 'material' and the idea of materiality are commonly understood, and every day judgments on a variety of subjects are made upon the basis of a layman's sense of materiality.

"In the last analysis questions of materiality cannot be removed from a jury's consideration. Although to an exclusionary extent the court may rule out evidence as immaterial, it does not follow that the materiality of the evidence admitted is not something for the jury to consider in weighing the evidence. When we say that the materiality of evidence is for the court but the weight to be given to it is for the jury, we only indicate a certain separation in the function of court and jury in sifting the evidence. It would be a mistake to think that any question of materiality is thereby removed from the jury's sphere or that the jury process of weighing evidence is something entirely apart from judging its materiality.

"What the law really does, in the interest of a fair trial and reasonably controlled trial, is to vest in the court a preliminary power of ruling on the materiality of evidence to the end that evidence which a jury should not consider at all may be excluded from their consideration altogether. A ruling in favor

Bailey and Bolan). *Lase v. United States*, 49 F. 2d 241 (9th Cir.); *People v. Clemente*, 285 App. Div. 258, aff'd 309 N. Y. 890.

This Court has noted that matters first presented as questions of law when their admissibility is disputed may become questions of fact for the jury's determination by the end of the trial. *McNabb v. United States*, 318 U. S. 332, 339n. This prospect, realized in the case at bar, may not have been in contemplation when the cited portion of this Court's *Sinclair* opinion was delivered.

Certain it is that, when Judge McGohey determined materiality against petitioners at the close of the Government's case, he closed the doors to further proof and to all argument on the issue of materiality.

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of materiality means no more than that the jury may consider the evidence. Its materiality then becomes a question of fact for the jury. And certainly materiality as a substantive element of the crime of perjury is something more than materiality considered in an evidentiary ruling by the court. Materiality in such a case becomes a matter for ultimate determination by the decisional process.

"We are not persuaded to the view, therefore, that the nature of the subject requires the removal of the question of materiality from the jury's consideration or reserving it to the court. • • •" *People v. Clemente*, 285 App. Div. 258, 261-262 (1st Dep't), *aff'd* 309 N. Y. 890, 131 N. E. 2d 294.

In the case at bar petitioners contended before the Court of Appeals that the instructions of the trial judge to the effect that the alleged false statements related to material matters deprived them of their right to trial by jury of all the essential elements of the crime charged. Since this Court has not passed on the constitutional question so raised, the Court of Appeals was not foreclosed from considering the question and from overruling *Carroll v. United States* as an erroneous holding on this important issue. As the Court of Appeals for the Fifth Circuit commented in *Brooks v. United States*, 240 F. 2d 905 at 906:

"Heinous as the crime of perjury is under our law, it is entitled to no relaxation of the constitutional guaranty of the citizen in order to punish it."

II.

The United States Court of Appeals rested its affirmance of the convictions for perjury and obstruction of justice squarely upon the ground that the test of materiality is whether it appears by the terms of the question that the answer cannot be material; unless it does so appear, materiality must be deemed established for all purposes; and the fact that the accused stated *immaterial* matter which they did not believe to be true, or that the true facts called for by the question were likewise *immaterial*, does not prevent a finding that material matter was stated in the answer. It is submitted such ground presents a hitherto unprecedented and radically unsound proposition, which ignores the text of the perjury statute and substitutes what is conceivable intellectually (that there *can* be a material answer to a certain question) for common law evidence of actual materiality.

The Reasoning of Judge Hand's Opinion Affirming the Convictions

Judge HAND's opinion explicitly disclaims that the affirmance of the convictions rests upon the "possibility" that "the omitted passages, if followed up by cross-examination, might have led to relevant disclosures." (The record shows conclusively that this possibility did not exist in the case at bar.)

After disclaiming the foregoing "possibility", Judge HAND's opinion makes the realistic assumption "that the disclosure of the omitted passages would have contributed nothing to what the grand jury was seeking." The opinion then proceeds to the ground actually adopted: that materiality in a federal perjury prosecution must be decided by a reading of the question, "no matter what the answer may be * * *."

The *ratio decidendi* of Judge HAND's opinion is stated in these words:

> "No matter how right the witness might be in believing that the answer would not contribute to the investigation, he was bound to leave that decision to the tribunal. A question is 'material,' no matter what the answer may be, unless it appears by its terms that the answer cannot be 'material.' In the case at bar it was enough to make Siegel's testimony 'material' as to the originality of the memoranda that the interviews between him and Matusow might have thrown light upon his recantation. If Siegel was right in supposing that a truthful answer could not have assisted the grand jury, no doubt it would be reasonable to temper the severity of the sentence, as Judge McGohey did in the case at bar. But the eventual impertinence of what was concealed could not excuse preventing by false testimony the grand jury from deciding that question. It is scarcely necessary to add that 'materiality' is always a question for the court. *Sinclair* v. *United States*, 279 U. S. 263, 298; *Carroll* v. *United States*, 16 Fed. (2) 951 (C. A. 2); *United States* v. *Alu*, 246 Fed. (2) 29, 32 (C. A. 2)."

The Reasoning Ignores the Text of the Perjury Statute

18 U. S. C. §1621 provides:

> "Whoever, having taken an oath * * * that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *"

This Court has always recognized that the perjury statute means literally what it says. In *United States* v. *De*

brow, 346 U. S. 374, 376, it enumerated among the "essential elements of the crime of perjury" "a false statement wilfully made as to facts material to the hearing." In *United States* v. *Norris*, 300 U. S. 564, 573 it made the test "The materiality of the respondent's false answers * * *." In *Markham* v. *United States*, 160 U. S. 319, 324 it said:

> "Under the plea of not guilty the Government was required to show the materiality of the alleged false statement, * * *".

In *Christoffel* v. *United States*, 338 U. S. 84 at 89, this Court said:

> "We are measuring a conviction of crime by the statute which defined it."

The statute defining the crime of which petitioners have been convicted makes no one guilty of perjury unless he "states or subscribes any material matter" falsely under oath. This measures materiality by what the witness states or subscribes; it does not permit materiality to be measured by the terms of the question, "no matter what the answer may be." It is equally impermissible to judge materiality by an imaginary answer in place of the one the witness actually "states or subscribes."

The Reasoning Confuses the Test for Contempt With the Test for Perjury

The two familiar federal contempt statutes are 18 U. S. C. §402 (willful disobedience to a lawful process or command of a court) and 2 U. S. C. §192 (willful refusal "to answer any question pertinent to the question under inquiry" in a congressional investigation). Applying the latter statute in *Sinclair* v. *United States*, 279 U. S. 263, 298, this Court necessarily emphasized the question and its connection to the subject of inquiry.

In contempt there usually is no answer to consider;* pertinency is determined by examining the question in its context.

Assuming a pertinent question, an evasive answer constitutes contempt,** but it does not also constitute perjury, unless the content of the answer is material. In the case at bar the content of the false answer was immaterial, as well as the content of the true answer if it had been given: in truth three of the memos were not as originally dictated, but had been revised to take out immaterial content touching Gloria Swanson, Colonel Bredin and Michael Shore—all of whom were conclusively demonstrated to be ignorant of any relevant information about Matusow.

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* Answers are assayed in contempt proceedings only to determine purgation. Cf. *People ex rel. Falk* v. *Sheriff of New York County*, 258 N. Y. 437, 180 N. E. 110. A Seabury investigation witness, jailed in contempt for refusing to answer the question whether he had bribed public officials, claimed his Constitutional privilege. After the courts held that his testimony gave him immunity, he reappeared before the committee and answered "No." The legislative committee contended that his negative answer must be false in view of the earlier claim that an answer to the question would incriminate him, and denied that the contempt was now purged. The State Court of Appeals said, *per curiam* (Chief Judge [later Mr. Justice] Cardozo presiding) (at p. 440): "To hold that he must stay in jail because he has given an answer 'no' would be equivalent to ruling that he must stay there till he gives the answer 'yes.' This would be to hold that he must confess the crime of bribery whether he has committed it or not."

** *United States* v. *McGovern*, 60 F. 2d 880, 889 (2 Cir.).

The Reasoning Is Unprecedented and Unworkable.

Neither in the District Court nor in the Court of Appeals did the Government ever advocate the test launched in Judge HAND's opinion that "A question is 'material,' no matter what the answer may be, unless it appears by its terms that the answer cannot be 'material.'"

District Judge BRYAN denied a motion to dismiss the indictment which had been made on the ground that the false answers were self-evidently immaterial as a matter of law; this merely held the indictment good on materiality as against a demurrer; even in so doing, Judge BRYAN said in his decision:

> "Defendant must then stand trial though, of course, in order to obtain a conviction, the Government must prove at the trial that the false statements were material matter. United States v. Baltimore, D. C. Cir., 215 F. 2d 847." (App. B, pp. 13-14.)

It would seem elementary that the Government must prove "that the false statements were material matter." The perjury statute so provides. This Court so stated in *Christoffel* (338 U. S. 84 at 89):

> "An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt."

The test now proposed by the Court of Appeals would relieve the Government of such an obligation to prove the element of materiality in perjury; and it would subject defendants who dispute materiality of the answer to the trial judge's individual decision as to whether the question was such that "it appears by its terms that the answer cannot be 'material'."

This test is too synthetic for practical use in administering criminal justice. It exalts what is conceivable (whether there *can* be a material answer to the question) above what is factual (in the case at bar, that "the disclosure of the omitted passages would have contributed nothing to what the grand jury was seeking").

This makes the definition of criminal perjury depend on what might be instead of what is. In this case, it makes perjury depend on an intellectual conception, unhampered by the probative evidence (assumed by Judge HAND's opinion) that both the false answer and the true one were clearly immaterial.

It is galling to contemplate that worthy American citizens of previous good repute could be branded as felons in a court of law by means of an intellectual conception in lieu of common law evidence.

In the case at bar the Government's proof was not directed at negativing some abstract possibility that the answer could not be material. The reasoning of the Court of Appeals makes that the Government's burden. Adding the Constitutional presumption of innocence and the prosecution's burden of proof into the mixture, it is difficult to visualize how the Government shall hereafter proceed in a perjury case. To visualize an actual trial for perjury, for instance the case at bar: Instead of undertaking to prove that the grand jury wished to interview all those to whom Matusow had spoken, even casually, the Government would have been required to establish a double negative: that it did not appear by the terms of the question that the answer could not be material. An experienced prosecutor might conclude after study that he could meet this test by merely submitting to the trial court (not the jury) one hypothetical answer which would be material; and to be safe he would submit several. The defense would

not seek by the testimony of Morris L. Ernst or otherwise to show that the grand jury was not in fact interested in interviewing those who spoke to Matusow, and even refused proffered testimony of Matusow's conversations with Ernst about recantation; would not show by the witnesses Swanson, Bredin and Shore that they had nothing to contribute to what the grand jury was seeking; but would devote itself to persuading the trial court that the terms of the question did not admit any answer which possibly could be material. This quixotic test can not be visualized in operation, for it is too unreal to be operable.

In the proceeding before Judge MURPHY when Miss Shapiro refused to name the client who was with Siegel and Matusow on June 18, 1954, the judge would have had to imagine the identity she declined to disclose. It could conceivably have been some lawyer concerned with the applications for new trials later made on the basis of Matusow's recantations, or someone ultimately connected with publishing Matusow's book. Absent any answer, the possibility of a highly material answer always exists. But once the answer is in the record, and the person identified is one who is shown to have had nothing to do with Matusow's recantation and to have heard nothing about it, the tribunal no longer operates *in vacuo* or on imaginary hypotheses; materiality becomes determinable from existing, objective facts. Surely these are a better basis than conjecture for making judgments in any criminal case, and in a perjury prosecution no other basis should be considered.

III.

While there was and is no real question about the truth of Siegel's testimony concerning Matusow's conversations with him, this testimony was found embarrassing to the Government's position in *United States* v. *Flynn*, where a new trial motion was pending before Judge *Dimock* and the U. S. Attorney's Office was facing charges against its own staff. When Siegel admitted having given false and erroneous answers about inconsequential aspects of his own aide memoire, the Assistant U. S. Attorney returned petitioners to the grand jury to record and enlarge upon these admissions, and thereby justify the Assistant U. S. Attorney in suppressing Siegel's testimony from Judge *Dimock* on the basis that Siegel was discredited. This use of the grand jury to discredit a witness whose evidence might otherwise embarrass the U. S. Attorney's position in a pending litigation, and the subsequent carrying out of the threat that Siegel would be prosecuted unless he changed his testimony, which was true and was never changed, deprived petitioners of due process of law. The use of the grand jury testimony, recorded to discredit, oppress, and harass petitioners, in prosecuting them for perjury and obstruction of justice, violated their Constitutional rights.

At the time of the occurrences herein Thomas A. Bolan had been an Assistant U. S. Attorney for only eighteen months. He was an inexperienced young lawyer, only four years at the bar (App. E, p. 26).

In his conduct of the grand jury proceedings after March 8, 1955 when he received the chronological summary, Bolan chose to treat petitioners' errors of judgment, founded on sincere motives and concern for ethics, as criminal miscon-

duct. At his instigation the federal grand jury extensively and repeatedly heard and then indicted Siegel and Miss Shapiro. At his instigation the prosecution was pressed. He did not leave the U. S. Attorney's office to join Roy M. Cohn until he was assured that the case would be brought to trial. After leaving the office, he helped prepare the case for trial. He appeared as a witness for the Government at the trial against his victims.

When he testified, Bolan conceded that after Siegel's first grand jury appearance on March 3, 1955 he determined that Siegel would be a Government witness at the *Flynn* hearing before Judge DIMOCK, and so notified Siegel (App. E, p. 27). Later, after studying the chronological summary, Bolan decided that Siegel's testimony would damage the Government's case in the DIMOCK hearings but must be produced nevertheless. Only then came his decision that a grand jury inquiry should be conducted into the memoranda which Siegel had produced (App. E, pp. 27, 29-30).

Prior to the instant case there was no precedent in the Second Circuit for the trial court's ruling which excluded evidence tending to show immateriality by showing that the grand jury had been misused in this manner by Mr. Bolan. Excluded was defense evidence of the situation described in *Brown* v. *United States*, 245 F. 2d 549, 555 (8th Cir., appeal pending): "Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt."

The defense evidence so excluded* touched inevitably the sensitive roots of the whole prosecution. It tended to show that after March 22, 1955 when Siegel informed the U. S.

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* 156a-170a.

Attorney's office of the falsehood, Bolan recalled Siegel to the grand jury and questioned him, not to ascertain the factual history of Matusow's recantation, but to make a grand jury record of Siegel's admission that he had given false and erroneous answers. This appears to have been done simply to discredit Siegel by indicting him and thereby to excuse the Government's suppression of his evidence from Judge DIMOCK. Even were this a permissible technique of advocacy, the subject matter of Siegel's testimony about changes in the aide memoire did not thereby become a material subject of inquiry by the grand jury when there is no question that with or without their aid he testified truthfully to all of Matusow's material statements.

In England the grand jury served two uses: it brought accusations against law violators and it protected the rights of the people from oppression by the Crown.[1] Of these functions the latter was the more important historically.[2] This Court said in *Hale* v. *Henkel* (201 U. S. 43, 59):

> "[T]he most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."

(See also *Hoffman* v. *United States*, 341 U. S. 479, 485.)

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[1] J. Rodney Lee, "The Powers and Duties of the Grand Jury," 8 Baylor L. Rev. 194 (1956); Irving R. Kaufman, "The Grand Jury—Its Role and Its Powers," 17 F. R. D. 331, 335 (1955); 24 Am. Jur., *Grand Jury* §3 (1939).

[2] "The primary function of the English grand jury was to protect the rights of the subject against the king • • •" Note, 39 Calif. L. Rev. 573, 574 (1951). See also note, 37 Minn. L. Rev. 586 (1953) and A. Vere Shaw, "The Grand Jury—Use It or Lose It," 32 J. Am. Jud. Soc'y 6 (1948).

Here Bolan was obviously intent on discrediting Siegel and the grand jury was not interested in hearing witnesses who would have verified Siegel's substantive testimony. The defense sought to show that Bolan's actions were dictated by "malice" and "personal ill will," and that the grand jury was used to discredit Siegel (SM 1644, 1650, 1685).

In this country grand juries usually carry out decisions made by prosecutors.[3] In large urban centers like New York grand jurors, having no personal knowledge of either the alleged offense or offender, customarily take their guidance from the prosecutor. One writer has concluded:

> "But today, I fear that protection [of the innocent from the prosecuting power of the government] is more presumed than real. Almost without exception the grand jurors know only the facts of the case that the state's attorney chooses to present, and almost invariably grand jurors follow the wishes of the prosecutor as to who shall be indicted and who shall not be indicted. In fact, it is now quite safe to say that the reliability of the grand jury runs just about parallel with the reliability of the state's attorney."[4]

This Court recognized the prosecutor's power when it observed in *Hale* v. *Henkel* (at p. 65):

> "Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life."

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[3] Note, "Criminal Law: Powers of Federal Grand Juries," 39 Calif. L. Rev. 573, 575-576 (1951); Wayne L. Morse, "A Survey of the Grand Jury System," 10 Ore. L. Rev. 295, 325-326 (1931).

[4] Robert R. Canfield, "Have We Outgrown the Grand Jury," 40 Ill. Bar. J. 206 (1952).

A grand jury's investigative "power is limited to criminal offenses and does not extend to groundless snooping into the affairs of others."

The establishment of the privilege against self incrimination "is closely linked historically with the abolition of torture. * * * But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed. We want none of that today, I am sure." (Griswold, "The Fifth Amendment Today" [1955], p. 7.)

The proceedings over which Mr. Bolan presided after March 21, 1955 in the federal Court House in New York (as to which the Court is respectfully referred to pp. 18-20, 24-25 and 27 of Appendix E) were not, to be sure, the medieval form of torture. They bore much greater resemblance to the present-day executive type of justice administered in European criminal tribunals or by administrative officers, to which it is customary to point when distinguishing between Soviet purge trials and justice according to law. The dark night of the soul which petitioners survived, only to be indicted in the end, bears relevantly on the issue of materiality; that episode in the administration of criminal justice in the Southern District of New York should have been explored at the trial upon any theory of materiality including that of Judge Hand's opinion.

J. Rodney Lee, "The Powers and Duties of the Grand Jury," 8 Baylor L. Rev. 194 (1956).

IV.

The right of petitioners to a fair and impartial trial was violated by the prosecutor's statements in summation to the jury imputing to petitioners a connection with Matusow and Communist conspirators who brought about Matusow's recantation. This was not a fair inference from any evidence in the record and was contrary to the only record evidence on the subject. Some thirty days after making these inflammatory and prejudicial suggestions, the same prosecutor admitted in open court at the time of sentencing that the statements had never been the Government's contention and that there was no evidence in the record to support his insinuations.

The misuse of the grand jury by Mr. Bolan and his pretext that Siegel might have been connected with Matusow's recantations, brought about the indictment and prosecution. At the trial Mr. Bolan as a witness and Arthur B. Kramer as prosecutor grafted this pretext unnaturally upon petitioners' admissions that false and erroneous answers had been given about inconsequential aspects of Siegel's aide memoire. The purpose and effect was to create the unbeatable case.

There was not an iota of truth in the intimation that Siegel had an undisclosed connection with Matusow; but the insinuation that he did, carrying with it the sinister undertone that the Government "knew something" more than the evidence disclosed, made the convictions certain.

Before summing up to the jury Mr. Kramer had heard his own witness Bolan testify (SM 1626):

"* * * after March 22nd * * * From that point on Mr. Siegel said his only reason was to protect his clients, and that is what I meant by a consistent explanation."

At the sentencing on February 18, 1958 Judge McGohey said with the concurrence of Mr. Kramer (App. E, p. 32):

"Well, that, I think, is the most telling point, that the testimony of the defendants with respect to what was in their minds when they did this has not been counteracted by any evidence offered by the Government, and furthermore, in so far as the record discloses there were no other persons at any time at any of these meetings other than the Colonel Bredin and Miss Swanson and Shore * * *"

But when Mr. Kramer summed up to the jury on January 16, 1958 he said (App. E, p. 34):

"That reason was developed after the fat was in the fire. That is] something that they have now dreamt up and they dreamt up in the days following March 20th to excuse an inexcusable act."

At still another point Mr. Kramer said to the jury. (App. E, p. 36):

"But there was no conceivable reason for falsifying that particular record, certainly not the reason that the defendants now give. I say that it is something that has been recently conceived to excuse what we contend is an inexcusable series of acts."

It was deliberate misconduct on the part of Mr. Kramer to tell the jury flatly that petitioners' explanation—that they sought to protect innocent clients from scandalous and

destructive notoriety[1]—was an afterthought, a recent fabrication.

But Mr. Kramer did not stop there. To be certain of getting a conviction he told the jury with the authority of his official position that Siegel's contacts with Matusow were not as innocent as Siegel would now have them believe. There was at the time no evidence but that of petitioners, corroborated by the Government's witness Mary Manna, as to what the revised memoranda had contained before they were revised; and this uncontradicted evidence was of course corroborated by the testimony of the witnesses Swanson, Bredin, and Shore. Notwithstanding this, Mr. Kramer said in his summation (App. E, p. 33):

> "There may have been some information in these memoranda that was damaging to Siegel personally. Maybe he wanted to keep that secret."

Then came the *coup de grace*. In view of the locale, New York, and the time, 1958, no more prejudicial blow could have been struck than to impute Communism to a defendant in such a trial as this. If made outside the court room, this would be the grossest form of slander.[2] And the blow was wholly foul, for Siegel was shown to have been a sincere anti-Communist all his professional life, playing a consistently prominent role in causes dear to the hearts of patriotic and civic-minded citizens, and the

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[1] Canon 15 of the Canons of Professional Ethics reads in part: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty."

[2] Cf. *Mencher* v. *Chesley*, 297 N. Y. 94.

Government had offered no evidence to the contrary (App. E, p. 1; 186a).

Notwithstanding, the following occurred during Mr. Kramer's summation (App. E, pp. 33-34):

[Mr. Kramer:]

"He [Siegel] told Mr. Bolan at the time that he was under questioning in this office another reason, and perhaps this is a possible reason. I am not suggesting it as the reason, but this is another possible reason, that his contacts with Matusow were not as innocent as he would now have you believe. Certainly he spent a good deal of time with Matusow. We know that he had dinner with him or that he was with him on two occasions at the Blair House. From Shore's testimony we know that he invited Matusow to have dinner with him on one occasion at the Blair House. Certainly this wasn't a relationship of a man who thought he was dealing with a crackpot. Siegel was just a little bit too anxious on his first trip, first occasion before the Grand Jury to tell everybody how he spotted Matusow as a nut from the beginning. I mean, he was too anxious.

"Now, in 1955, when he testified, Matusow had suddenly fallen from favor. You know prior to that time he had worked for the McCarthy Committee, he had been used as a Government witness, and I suppose he had a certain amount of usefulness.

"The Court: Pardon me, Mr. Kramer; do you really think it is worthwhile to go into that? You have argued to this jury that it has no bearing on this at all, that intent does, but not motive, and now you are instituting a whole series of motives which you apparently want the jury to consider. *I think that is improper.*" (Emphasis added.)

Judge McGohey's mild admonition prevented any continuation of the insinuations. It could not undo the indelible damage. The impress on the minds of jurors in the Southern District of New York of the words already uttered was ruinous. "The reverberating clang of those accusatory words would drown all weaker sounds" (as Mr. Justice Cardozo said for this Court in *Shepard* v. *United States*, 290 U. S. 96, 104). "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed" (*id.*).

In *Berger* v. *United States*, 295 U. S. 78, 88, this Court said:

> "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

What makes this case an extraordinary if not unique violation of the rule of fairness laid down in *Berger* is that here the prosecutor who made the improper insinuations stood in the same court room thirty days later and conceded to Judge McGohey, who had presided at the trial, that the Government had no basis whatever for contending that petitioners had any motive to hide any connection with Matusow and that on the contrary, the record "shows complete absence of any such intention on the part of either of these defendants" (App. E, pp. 31-32).

It is submitted that this Court should consider whether the misconduct of this prosecutor does not demand its scrutiny and review.

V.

In this trial for obstruction of justice and perjury it was reversible error for the trial court: (1) to refuse to charge that "'corruptly' means for an improper motive" and to instruct the jury that petitioners' motive to protect clients from damaging notoriety was irrelevant on the issue of intent; (2) to charge that the accused's admissions of false grand jury testimony were "equivalent to a plea of guilty" on the perjury counts, which created incurable prejudice even though in a supplementary charge the trial judge undertook to explain his statement, isolating the concepts of "intent and knowledge" from his previous conclusion that a "plea of guilty" had in effect been entered; (3) to refuse to give additional instructions requested by the trial jury during its deliberations.

All of the subject matter herein discussed was termed by the Court of Appeals "too trivial to require discussion" (App. A, p. 6).

(1) Judge McGohey refused (SM 2769) to instruct the jury, as requested by petitioners, that in the obstruction of justice charges "* * * the term 'corruptly' means 'for an improper motive'" (Defts. Req. No. 17, SM 2033; *Martin* v. *United States*, 166 F. 2d 76, 79 [4th Cir.]).

Instead he instructed the jury "that that word 'corruptly' means knowingly, wilfully, and with evil intent to violate the statute which they are charged with violating" (195a) and further that "the ultimate motive of protecting their clients would not excuse either of them here if you find that they did have the *evil intent to keep from the Grand Jury something which the Grand Jury had a right to have*" (196a; emphasis added).

Petitioners duly excepted (230a).

In supplementary instructions Judge McGohey added:

> "—I charge you as a matter of law that the Grand Jury was a duly impaneled grand jury, that it had authority to conduct the investigation that it was conducting, that it had authority to call upon witnesses to come before it and testify, *that it had authority to call on them to produce papers,* documents, *any material that the Grand Jury asked them to produce.*" (262a; emphasis added).

In the circumstances of this case, the petitioners' motive and the sincerity of their consistent explanation that they acted solely to protect clients from damaging notoriety, were of great significance. The jury recognized this, asking during their deliberations "'Whether motive or reason for acts alleged in the indictment are pertinent'" (282a).

The trial court's instructions on these related points had the effect of depriving petitioners of any defense on the obstruction charges. For the jury was instructed that all that was pertinent was petitioners' intent to keep from the grand jury anything it had a right to have, and that the grand jury had the right to have any material it called for; motive was irrelevant. Following these instructions, the jury had no choice but to find petitioners guilty, as it did, on all counts charging the withholding of material from the grand jury. (The petitioners were acquitted of the two obstruction counts charging something other than withholding information—Count II charging influencing a witness, and Count VI charging the fabrication but not the destruction of notes.)

(2) It was prejudicial to petitioners for the trial court to instruct the jury "that Mr. Siegel's admission that his Grand Jury testimony concerning the April 21 memorandum was false is equivalent to a plea of guilty" (201a) and

that "you have * * * his own admission before you, which I said is tantamount to a plea of guilty" (202a). Petitioners excepted (231a-232a).

Judge McGohey undertook to explain his statement in his additional charge, as follows:

> "Now, you recall that at one time I said there were admissions on the stand or testimony on the stand by Mr. Siegel, and also by Miss Shapiro, that as to certain statements that they made in the Grand Jury when they were asked here on the stand whether certain of the statements they made in the Grand Jury were true or false, they said they were false, and I stated that that statement was tantamount to a plea of guilty. That was perhaps an inaccurate statement to this extent: It was not proof of the guilt of the defendants with respect to the charge of perjury as regards that statement, and for this reason: It was n[o] proof because it did not have any bearing on their intent or knowledge. It was a concession by them that the statements they made were false, but it was not a plea that the false statements were made with the evil intent and served the evil intent not to tell the truth, or with the requisite knowledge, and certainly it was not, and this was the fear expressed by defense counsel. It was not so intended as I tried to make clear at that time in connection with my instructions as to any of the alleged perjurious statements which they admitted here are false that you should and had to convict, because I thought I told you but if not I tell you now that was peculiarly your function whether or not these defendants are to be found guilty, that it is for you to say and not for the Court, and that the Court has no view with respect to that question of guilt or innocence. That is expressly and solely for you" (250a-251a).

It is submitted that the prejudicial effect of the words "plea of guilty" could not be cured by the above explanation and requires a reversal of petitioners' convictions on the perjury counts.

(3) The trial court refused to give additional instructions requested by the jury during its deliberations, and instructed the jury incorrectly upon certain vitally searching inquiries.

The jury retired at 2:50 P.M. (SM 3158). At 3:05 P.M. it asked for all exhibits and for the blackboard giving the calendar for March 1955 (SM 3159). At 3:30 P.M. the jury sent in its second note, court's Exhibit 9, requesting the text of the charge (SM 3162-3). At 3:55 P.M. the court refused the charge, but agreed to instruct them "if you will indicate to me what it is you wish to inquire about" (SM 3164). The Foreman responded (SM 3164-65):

> "one of the jurors isn't quite clear on one phase of your charge dealing with how legal this Grand Jury's authority was, or the association with it of the District Attorney, the Assistant District Attorneys."

Juror No. 9 said:

> "It seems that the testimony is—" (SM 3165).

The court stopped him:

> "Never mind what the testimony is. What is the problem that you have concerning the Grand Jury?" (SM 3165).

Juror No. 9:

> "Well, I don't know whether the Grand Jury testimony here is legal or not or is admissible here" (SM 3165).

The court:

> "Well, I have admitted the testimony and that disposes of that. I have admitted the testimony for certain purposes. Certain testimony was admitted against both defendants and other Grand Jury testimony was admitted only as to one defendant and can be considered only against the defendant against whom it is admitted, but in so far as the legality of the Grand Jury is concerned, is that your problem?" (SM 3165).

This remark did not answer the juror's question, or tend to do so, but must have upset the juror and made him feel he was incurring the anger of the court.

Juror No. 9 asked "Were the Grand Jury also led and directed as Mr. Bolan testified by the District Attorneys?". (262a). The court (262a), "The Grand Jury—according to Mr. Bolan's testimony—was advised by the District Attorneys, the Assistant District Attorneys according to his testimony." Juror No. 9: "By the District Attorneys?" (262a). The court: "By the Assistant District Attorneys, which is their proper function and their duty, to advise the Grand Jury" (262a-263a). Juror No. 9: "Wasn't the investigation that the Grand Jury was investigating whether or not also besides Matusow, weren't they investigating the District Attorney's office?" (263a). The court (263a): "No, they were investigating whether or not a former Assistant United States Attorney, Mr. Cohn, had known, as Matusow claimed, that Matusow was testifying falsely when he testified in the Flynn trial." Juror No. 9 (263a): "Then wouldn't it mean—" The court (263a): "Now you can't argue with me whether or not that is right or not. That is the law, that the Grand Jury was correctly impaneled, that they were to be legally advised by the Assistant United States Attorney, and it was his duty to act as such adviser." Juror No. 4

(addressing Juror No. 9): "Is that all right?" (263a). Juror No. 5 (addressing Juror No. 9): "Is that what you want?" Juror No. 9: "I have to take it, I have to accept it?" (263a).

The foregoing was gross error and calls for this Court's scrutiny. The trial court diverted attention from the juror's specific question instead of answering it. The answer to the question was yes, not no—the grand jury, according to the indictment which the petit jury had before it, alleged in Count I, paragraph 2, that Matusow had executed an affidavit in which he stated that he had given false testimony in the *Flynn* case, known as such to Roy M. Cohn, then an Assistant U. S. Attorney, and (par. 3) that the grand jury was investigating whether or not Matusow had committed perjury during his testimony in the *Flynn* case and whether "*any* representative of the United States Government had knowledge of the same." The defense had cross-examined Mr. Bolan as to bias in his conduct of the investigation which culminated in the present indictment. The grand jury certainly was investigating the U. S. Attorney's office in connection with Matusow. Bolan had conducted this investigation; Bolan as the adviser to the grand jury was suspicious of Siegel, he was not suspicious of Roy M. Cohn, for whom he went to work upon leaving the U. S. Attorney's office. Bolan had refused to get rid of his suspicions of Siegel, and although Bolan swore that the grand jury wanted him to interview all witnesses who had talked to Matusow prior to his recantations, Bolan did not call Morris L. Ernst before the grand jury; Ernst appeared as a witness for the defense and was not permitted to testify on the point (SM 2158).

At 10:40 P.M., after the jury had been deliberating some seven hours, the jury sent a note to Judge McGohey asking further instructions on several points (282a-283a).

Judge McGohey responded saying in part that "at this hour of the night, a quarter of eleven, after you have been deliberating since three o'clock, I am unable to make it any clearer than I did in my original charge, and I will not instruct you any further than I have already done" (283a). At a later point, when asked for a transcript of his charge, the judge refused, saying "if you did not get it the first time I do not think I could make it any clearer this time now" (289a).

Shortly thereafter the jury was sent to a hotel for the night, and in the morning returned its verdict without receiving further instructions (290a).

It is submitted that in so confusing and ill-tempered a prosecution, after a five-weeks' trial, where the jury had a twelve-count indictment to study, the refusal to give further instructions was error which requires this Court's review.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April 1959

APPENDIX A

Opinion of the Court Below Affirming Petitioners' Conviction

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 109—October Term, 1958.

(Argued November 13, 1958 Decided February 17, 1959.)

Docket No. 25130

UNITED STATES OF AMERICA,

Appellee,

—v.—

R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO,

Appellants.

Before:

HAND, HINCKS and MOORE,

Circuit Judges.

Appeals from judgments entered upon the verdict of a jury in a prosecution for perjury (§1621, Title 18, U. S. Code), and for obstructing justice (§1503, Title 18, U. S. Code).

WILLIAM G. MULLIGAN, *for the Appellants.*
ARTHUR B. KRAMER, *for Appellee.*

Appendix A

HAND, *Circuit Judge*:

This is an appeal from judgments of conviction entered by Judge McGohey upon the verdict of a jury. The indictment was in twelve counts, the 1st for a conspiracy to obstruct justice, the 2nd, 3rd, 4th, 5th and 6th for obstructing justice under §1503 of Title 18, U. S. C., and the 7th, 8th, 9th, 10th, 11th and 12th for perjury under §1621 of Title 18, U. S. C. The jury returned a verdict of guilty against the appellant Siegel on the 3rd, 4th and 5th counts for obstructing justice and upon four of the perjury counts, 7, 8, 9 and 10. It found a verdict against the appellant Shapiro on counts 3, 4 and 5 and on perjury counts 11 and 12. It acquitted both defendants upon the conspiracy count and on two of the obstruction counts, 2 and 6. The judge imposed upon the appellant Siegel a suspended sentence and put him on probation for a year and a day on each of the seven counts on which he was convicted, the sentences to run concurrently; in addition, he imposed a fine of $500 upon each of the four perjury counts. He suspended the imposition of sentence on the appellant Shapiro on all five of the counts on which she was convicted, and put her on probation for one year, the sentences to run concurrently. The appeal is based upon three main points: (1) that the prosecution did not establish that the testimony charged in the indictment was "material" to a proceeding pending at the time before the grand jury of the Southern District of New York, (2) that the defendants were not shown to have obstructed justice; and (3) that for seven separate reasons, stated in detail, the trial was unfair. The chief, and indeed the only important, question on this appeal is whether the testimony of the two appellants was "material" to an investigation pending before the grand jury for the Southern District of New York,

instituted to examine two affidavits of one, Matusow, in which he recanted testimony that he had given on two trials in July 1952 and in January 1954. The first of these was a prosecution against Elizabeth Gurley Flynn and others for violation of the "Smith Act," and the second was a prosecution of one, Jencks, for filing a false affidavit. Matusow's testimony had been important in both these trials, but in January 1955 he submitted an affidavit in each case in support of an application for a new trial, in which he recanted his original testimony, adding in the *Flynn* case that one of the prosecutors had known that his testimony was false and had procured him to give it. In February 1955, the District Attorney for the Southern District of New York instituted an investigation before the grand jury, the object of which was to ascertain the truth of Matusow's recantation and of his charge against the prosecutor.

The grand jury subpoenaed Siegel, a lawyer, because it was known that Matusow had talked with him about his recantation; and the subpoena directed him to produce any documents relating to Matusow. Siegel appeared on March 3, 1955, and swore that beginning in April 1954 Matusow had had seven interviews with him, seeking his help in raising money to publish a book about his, Matusow's, career in the role of a "blacklister." Siegel testified that shortly after each interview he had dictated memoranda of the substance of the interview, which the grand jury directed him to produce. On March 17th he reappeared and presented as the original memoranda documents, at least three of which were substitutes for the originals. Before this,—on March 7th—he had brought to the District Attorney in charge of the case a "chronological" memorandum which he said contained all the information contained in the original memoranda. The Dis-

trict Attorney read this, but, not being satisfied, asked for the originals and it was between the 7th and the 17th that Siegel prepared the substitutes. The District Attorney, being still dissatisfied, asked for the stenographic notes from which the typed pages had been transcribed. On March 20th at Siegel's direction his stenographer, Mary Manna, changed the original stenographic notes in her books so that they should correspond with the changed memoranda put in evidence on the 17th. Some of her original pages were destroyed and some were interlined; and Siegel put these fabricated pages in evidence on March 21st. The other appellant, Shapiro, was also a member of the bar, and she was not only privy to, but actually participated in, all that Siegel did and she corroborated on the witness stand his testimony before the grand jury.

The prosecution relied especially upon the substituted memoranda—and supporting stenographic notes—purporting to state the contents of three of Siegel's seven interviews with Matusow: those of April 21, June 18 and November 3, 1954. Although the originals of these had been destroyed by the appellants, independent evidence showed that the substituted versions contained omissions. The first of these omitted to say that the interview had not ended at Siegel's office, but that Siegel and Matusow had gone together to "Blair House"—a New York restaurant—and thence to the apartment of an actress, named Swanson, where there was also present Bredin, a retired officer of the U. S. Army. The omission in the second memorandum was of a dinner, also at "Blair House," given by one, Shore, a manufacturer of "a mechanical parking device," who had made an assignment for the benefit of creditors and was "involved in a bankrupt proceeding." The omission in the third memorandum was of a statement to Siegel at his

office in which Matusow had spoken of a telephone talk that he had had with Swanson while he was in Dallas, Texas. Bredin, Shore and Swanson were all clients of Siegel and his excuse for omitting all mention of their names was that he feared it would injure them in their business or personal affairs, if it should appear that they had been present at his interviews with Matusow, or that Matusow had talked with Swanson in Dallas.

As we have said, the appeals turn upon whether it was perjury and an obstruction of justice, to fabricate the false memoranda and swear that they were complete records of the interviews. That in turn depends upon whether that testimony was "material" to the investigation under way before the grand jury as to Matusow's recantation. Matusow was at the time of his interview with Siegel trying to get a publisher for his book, and it does not appear why he accompanied Siegel on the occasions when Siegel saw Swanson, Bredin and Shore, or why he reported to Siegel his telephone talk with Swanson in Dallas. Conceivably the omitted passages, if followed up, by cross-examination, might have led to relevant disclosures. However, we do not rest our affirmance of the convictions upon that possibility; on the contrary we will assume, *arguendo*, that the disclosure of the omitted passages would have contributed nothing to what the grand jury was seeking. The error of the appellants' position is that they confuse the "materiality" of the question with the "materiality" of the answer, as though it was proof that the question was immaterial, if the answer would have been so. It is, however, at once apparent that this substitutes the opinion of the witness for that of the tribunal as to the "materiality" of the answer. No matter how right the witness might be in believing that the answer would not contribute to the

investigation, he was bound to leave that decision to the tribunal. A question is "material," no matter what the answer may be, unless it appears by its terms that the answer cannot be "material." In the case at bar it was enough to make Siegel's testimony "material" as to the originality of the memoranda that the interviews between him and Matusow might have thrown light upon his recantation. If Siegel was right in supposing that a truthful answer could not have assisted the grand jury, no doubt it would be reasonable to temper the severity of the sentence, as Judge McGohey did in the case at bar. But the eventual impertinence of what was concealed could not excuse preventing by false testimony the grand jury from deciding that question. It is scarcely necessary to add that "materiality" is always a question for the court. *Sinclair* v. *United States*, 279 U. S. 263, 298; *Carroll* v. *United States*, 16 Fed. (2) 951 (C. A. 2); *United States* v. *Alu*, 246 Fed. (2) 29, 32 (C. A. 2).

The other points raised by the appellants are too trivial to require discussion. Nothing, for instance, could be more unwarranted than the charge that Judge McGohey was unfair or partial in his conduct of the trial. On the contrary he showed the utmost concern for the rights of the appellants whose strictures display an entire misapprehension of the essentials of a judge's duties.

We have discussed only the perjury counts; but what we have said is equally applicable to the attack upon the convictions under the "obstruction" counts. *Bosselman* v. *United States*, 239 Fed. Rep. 82 (C. A. 2); *United States* v. *Polakoff*, 121 Fed. (2) 333 (C. A. 2); *Broadbent* v. *United States*, 149 Fed. (2) 580 (C. A. 10); *Catrino* v. *United States*, 176 Fed. (2) 884 (C. A. 9).

Convictions affirmed.

APPENDIX B

Opinion of Hon. Frederick VanPelt Bryan Denying Motion to Dismiss Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Criminal No. 147–346

UNITED STATES OF AMERICA,

—against—

R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO,

BRYAN, District Judge.

Defendants move, pursuant to Rule 12(b)(2), Fed. Rules Crim. Proc., 18 U. S. C. A., to dismiss all twelve counts of the indictment against them on the grounds that each fails to state an offense.

The indictment arises out of an investigation by a grand jury in this district to discover whether (a) one Harvey Matusow had testified falsely in either or both of two unrelated trials in which he was a witness for the prosecution, or (b) whether Matusow had committed perjury in executing affidavits recanting his testimony in these two trials, and (c) whether there had been a conspiracy to influence Matusow to commit perjury by executing these affidavits.

Both defendants are charged in the indictment with conspiracy under 18 U. S. C. §371 to violate 18 U. S. C. §1503 by corruptly influencing, obstructing and impeding, and endeavoring to influence, obstruct and impede the due administration of justice in the course of these grand

jury proceedings (Count I), and with five substantive acts alleged to constitute violations of Section 1503 (Counts II to VI, inc.). Counts VII, VIII, IX and X charge defendant Siegel with perjury before the grand jury in the same proceedings in violation of 18 U. S. C. §1621. Defendant Shapiro is similarly charged with perjury before the grand jury in Counts XI and XII.

I will first consider the defendants' objections to the obstruction of justice and conspiracy counts and will then deal with their objections to the perjury counts.

Counts I to VI

According to the allegations of the indictment defendant Siegel is a lawyer, who had met with Harvey Matusow on at least six occasions when the subject of Matusow's testimony as a prosecution witness had been discussed. The substance of what occurred at these meetings had been recorded in dictated notes and in memoranda typed therefrom about the time the discussions had taken place. Certain of these notes had been dictated to one Mary Manna, named as a co-conspirator in Count I but not charged as a defendant, and others had been dictated to and typed by the defendant Shapiro.

Count II charges that defendants, knowing that Mary Manna was to be a witness before the grand jury in the investigation, influenced and endeavored to influence her to destroy notes dictated to her relating to Siegel's meetings with Matusow on this subject, to create substitute notes in their place, and to give false testimony to the grand jury concerning the time when a memorandum relating to the meeting was typed and when the notes from which it was written were dictated to her.

Appendix B

Counts III, V and VI charge that defendants, knowing that a grand jury subpoena had been served on Siegel's law firm requiring the production of all documents relating to Matusow, and that the grand jury had specifically requested Siegel to produce any memoranda he had made concerning his meetings with Matusow, destroyed memoranda relating to these meetings and notes dictated of them, and created substitute notes and memoranda in place of those destroyed for the purpose of passing the substitutes off before the grand jury as the original memoranda, which Siegel eventually did.

Count IV charges that defendants, knowing that the grand jury had requested the production of the stenographic notes of any memoranda regarding the Matusow discussions, removed from Mary Manna's stenographic notebook the notes which had been dictated to her and from which she had typed a memorandum concerning the discussions, destroyed the notes and caused her to create new notes in her notebook for the purpose of passing them off to the grand jury as the notes originally dictated to and written up by her, and that defendant Shapiro thereafter so passed them off to the grand jury.

Each of Counts II through VI alleges that defendants knew that the grand jury was conducting this investigation as to the alleged false testimony of Matusow, his alleged recantation of that testimony, and the alleged conspiracy in the latter connection. They further allege that defendants, by committing the acts specified "unlawfully, wilfully and knowingly did corruptly influence, obstruct and impede, and corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Southern District of New York, . . ."

Appendix B

Count I charges a conspiracy between the defendants and Mary Manna corruptly to influence, obstruct and impede the administration of justice and to endeavor to do so, and alleges, among the overt acts in furtherance of the conspiracy, the various specific violations of Section 1503 charged in Counts II to VI.

The defendants attack the sufficiency of these counts on several related grounds.

They first assert that the failure to allege in specific terms that the documents, notes or papers with which defendants' acts were concerned were "material" to the grand jury investigation makes these counts fairly defective.

Section 1503 under which the five substantive counts are laid deals with interference with or obstruction of the due administration of justice and endeavors so to do. The first portion of the section is for the protection of witnesses, jurors and court officers. It condemns those who corruptly or by threats or force endeavor to influence, intimidate, impede or injure such persons. The latter portion of the statute deals generally with the obstruction of justice. It condemns the corrupt influencing, obstructing or impeding of the due administration of justice and corruptly endeavoring to do so. Success is not the criterion of the statute though it may aggravate the offense. Thomas v. United States, 8 Cir., 15 F. 2d 958; Bedell v. United States, 8 Cir., 78 F. 2d 358, certiorari denied 296 U. S. 628. The statute condemns "any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent." United States v. Russell, 255 U. S. 138, 143, Broadbent v. United States, 10 Cir., 149 F. 2d 580, 581.

The indictment follows the specific language of Section 1503 and also spells out in detail the specific acts with

which defendants are charged. It is fully adequate under Federal Rules of Criminal Procedure, rule 7(c) to inform defendants of the essential facts constituting the offense with which they are charge by any standards. United States v. Achtner, 2 Cir., 144 F. 2d 49, 51; United States v. Silver, 2 Cir., 235 F. 2d 375; United States v. Debrow, 346 U. S. 374, 377.

At no point does Section 1503 use the word "material" in its context, nor does it anywhere say that the acts condemned must be in relation to a matter "material" to an action or proceeding. Section 1503 is quite different in this respect from the perjury statute, 18 U. S. C. §1621, which specifically provides that the perjury must be in relation to "material matter". If there be a statutory analogy it is to the second clause of Section 1001 which makes it a crime to make false statements or representations in matters within the jurisdiction of any department or agency of the United States, and, in contrast to the first clause of that section does not require that such statements or representations be with respect to a "material" fact. In United States v. Silver, supra, the Court of Appeals of this Circuit recently held that an indictment laid under the second clause of Section 1001 was not required to allege that the false statements charge related to a material fact since the clause contains no such language. See, also, United States v. Lange, D. C. S. D. N. Y., 128 F. Supp. 797. The reasoning of the Silver case applies here as well. It is plain that it is unnecessary for the indictment in the case at bar to allege in so many words that the matters here involved were "material" to the grand jury investigation when the statute contains no such language.

However, defendants rest their argument upon a broader footing. They argue that the charge of influencing, impeding or obstructing justice can be sustained only if it is in fact related to a matter or matters material to the inquiry. They refer to the allegations which spell out the details of the acts charged and assert not only that such materiality is not affirmatively shown by the allegations of the indictment, but that it is negatived by those allegations. They therefore argue that this indictment does not charge a crime under Section 1503 or a conspiracy to commit a crime under that section.

Defendants seem to consider "materiality" as a catalytic agent necessary to the validity of the indictment. However, the word "material" has little significance if used in the abstract and acquires significant meaning only if applied to a specific situation before the court, in this case an inquiry by the grand jury into specific matters plainly within its jurisdiction which are alleged in the indictment. The test of materiality in a grand jury investigation under the perjury statute is whether the false testimony has "a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation * * *." Carroll v. United States, 2 Cir., 16 F. 2d 951, 953, certiorari denied, 273 U. S. 763; United States v. Hirsch, 2 Cir., 136 F. 2d 976.

Even assuming that the same test of materiality applies here it would seem that the allegations of the indictment would clearly pass the test. For the acts of defendants in destroying notes and memoranda and creating substitutes for the purpose of submission to the grand jury surely had a natural tendency to impede the grand jury investigation if not to influence it.

But I believe that the requirements under the obstruction of justice statute should be put somewhat differently. Clearly the matters with which the acts or endeavors to influence, obstruct or impede justice in a grand jury inquiry are concerned must bear a reasonable relationship to the subject of that inquiry. If such matters bear no reasonable relation to the inquiry or its subject matter the acts may not constitute an obstruction of justice or an endeavor to do so. If they do bear such a relationship then they constitute a violation of the statute. Whether in such case matters so related to the inquiry be labelled as material or as relevant or merely as having a reasonable relation to the subject matter is of little consequence and seems to me to be largely an exercise in semantics.

It is alleged in this indictment that the grand jury, having under investigation various conflicting allegations of perjury against Matusow, and a conspiracy in that connection, sought to obtain memoranda and notes concerning discussions between Matusow and defendant Siegel relating to Matusow's allegedly perjured testimony. If these notes and memoranda do not bear a reasonable relationship to the subject matter of this grand jury's inquiry I do not know what does. These are matters plainly relevant to the inquiry. Whether they will ultimately turn out to be material in the sense that they form part of the basis for grand jury action, or whether the grand jury chooses to regard them as immaterial in that sense is beside the point. The question of such "materiality" is not for determination at the stage of the grand jury proceedings with which we are concerned here, much less for determination by these defendants themselves.

As Chief Justice Marshall remarked in United States v. Burr, 25 Fed. Cas. pages 55, 68, No. 14,693, in passing on

whether a paper which the grand jury had requested should be delivered to it,—"a paper to go before the grand or petit jury must be relevant to the case, even if its materiality were not proved—." After further discussion the Chief Justice "then remarked that as the letter was wanted by the grand jury, a witness having referred to it, that was sufficient to establish its relevancy, and directed it to be delivered to them." This is similar to what is alleged to have happened here.

The grand jury knew that these notes and memoranda concerned the very subject they were investigating and desired to see them. All this was known to defendants.

Thus, the matters concerning which these defendants acted or endeavored to act plainly bear a reasonable relationship to the subject matter of the grand jury's inquiry, or to put it another way, are relevant to the inquiry. This being so, the defendants at least endeavored to influence, obstruct and impede the administration of justice, if they did not actually do so, by destroying the evidence on these matters, creating other evidence in its place and influencing a witness to give false testimony concerning it. Any other view would hamstring grand jury proceedings on the one hand and emasculate the statute condemning obstruction of justice and endeavors to obstruct justice on the other.

I see nothing to the contrary in the three cases which defendants say, establish the proposition that the allegation of materiality is essential to an indictment under this section. Wilder v. United States, 4 Cir., 143 F. 433; Bosselman v. United States, 2 Cir., 239 F. 82; and United States v. Solow, D. C. S. D. N. Y., 138 F. Supp. 813. It is true that in each of these cases the indictment specifi-

charged were committed were "material" or "material and relevant" to the judicial proceeding concerned. But the point which the defendants raise here was not passed on in any of these cases. Nor do they hold that the indictment would be insufficient if, as here, absent the word "material", its allegations showed that in fact the matters concerning which the acts charged were committed bore a reasonable relationship to the subject matter of a grand jury inquiry.

The Solow case arose out of this same grand jury investigation of Matusow's alleged perjury. It was alleged that the accused had destroyed certain letters relating to conversations with Matusow concerning his testimony after these papers had been subpoenaed by the grand jury, and that, knowing of such investigation, and of an order for the production of the documents, the accused knowingly, wilfully and corruptly destroyed them to prevent their production before the grand jury. The indictment in that case specifically alleged that the correspondence was material and relevant to the matters which the grand jury was investigating. But there is no reason to suppose that the absence of these words would have rendered it insufficient when it was apparent from the allegations that the correspondence plainly bore a reasonable relationship to the matter under grand jury investigation. The point in the Solow case was quite different from that raised here. The statement of the court that "a fair reading of the indictment shows that it contains the essential elements of the crime charged" can scarcely be construed as a holding that the allegation of materiality and relevancy in so many words was essential to the sufficiency of the indictment under the circumstances.

The defendants also assert that the indictment must allege that they knew, or reasonably should have known, that the documents and notes which they destroyed were "material" to the grand jury's inquiry, and that accordingly the present indictment is fatally defective because it contains no such allegations. There is no merit to this contention.

It is alleged in the indictment that the defendants knew that the grand jury was conducting this very investigation and that the grand jury had subpoenaed or requested these very documents. No doubt it is necessary to allege that the defendants knew that there was some inquiry in which these papers might be required or that the grand jury had requested them, or perhaps both. However, such knowledge is amply and fully spelled out in this indictment by the allegations just mentioned, which are also quite sufficient to show that that the defendants knew that these documents bore some reasonable relationship to the subject of the grand jury inquiry if that also were required. Once the defendants knew these things their duty was clear and they had no right to tamper with or destroy these papers. It was for the grand jury and not for the defendants to decide whether they were "material" to the inquiry in the limited and restricted sense in which defendants seek to apply that term. Cf. Brown v. United States, 276 U. S. 134, 145; Commonwealth v. Southern Express Co., 160 Ky. 1, 3.

Defendants make a further argument. They point out that there is no allegation in the indictment that any of the substitute notes and memoranda "created" by defendants in place of those destroyed, were in fact any different in substance from the originals. They therefore claim that the destruction of the originals and the manufacture

of the substitutes could have made no difference to the grand jury's investigation in any event. They thus conclude that under no circumstances could they be guilty either of obstructing or impeding the administration of justice or of endeavoring to do so since justice could not have been obstructed or impeded in any manner by what they did.

The grand jury in the performance of its duties is not required to accept the word of a witness that substituted documents contain the substance of the originals or even that they are exact copies. It is entitled to insist upon the production of originals if such are available. Nor does a grand jury have to accept the testimony of a witness, in this case Siegel or Shapiro, that the documents were the same as the originals. "Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed * * *." Carroll v. United States, supra, 16 F. 2d at page 953.

The original memoranda and notes which summarized the discussions between the defendant Siegel and Matusow were not only proper subjects of the grand jury investigation but the grand jury had the right and, in fact, the duty to obtain and examine them. They could be clearly helpful to the grand jury in determining whether the oral testimony given by defendant Siegel was true or false and might also lead to other avenues of inquiry which might aid the investigation.

Moreover, the indictment charges defendants with wilfully, knowingly and corruptly destroying the originals and corruptly creating substitutes. It is difficult to see how such allegations can be construed to mean anything

other than that the destruction of the original documents and the creation of the substitutes was in an endeavor "to do or accomplish the evil purpose that the section was enacted to prevent." United States v. Russell, supra.

Only one further objection, limited to Counts III, IV, V and VI, need be considered. Defendants contend that these four counts charge only that the defendants failed to perform their own obligations as witnesses before the grand jury and that therefore if they committed any crime it was punishable only as perjury or contempt.[1]

Assuming that the allegations of these four counts would sufficiently spell out a charge of perjury or contempt (but cf. as to contempt In re Gottman, 2 Cir., 118 F. 2d 425) that does not preclude them from being valid counts charging violation of Section 1503. The same transactions or acts may constitute a violation of two different statutes and a defendant may be tried for violating either or both provided the offense defined in one embraces an element or elements not included in the other. Gavieres v. United States, 220 U. S. 338; Catrino v. United States, 10 Cir., 176 F. 2d 884; United States v. Miro, 2 Cir., 60 F. 2d 58. The acts and endeavors to obstruct and impede the administration of justice which are charged in this indictment include the suppression or destruction of memoranda and documents and the manufacture of other documents for purposes of passing them off to the grand jury as the originals, none of which took place in court or before the grand jury. These are not elements of the crimes of perjury or contempt which relate to the conduct of a

[1] The defendants' analysis of these four counts is by no means correct since Count IV includes the specific allegation that defendant Siegel did "corruptly cause the said Mary Manna to create certain notes and insert them in said stenographic notebook * * *."

witness on the stand. There is no reason why the defendants cannot be tried for these acts under the obstruction of justice statute.

Defendants' objections to the sufficiency of Counts I through VI of the indictment are therefore overruled.

Counts VII to XII

These counts variously charge one or the other of defendants with testifying falsely under oath before the grand jury with regard to the existence, availability, authenticity, dictation and typing of the notes and memoranda which summarized the discussions between defendant Siegel and Matusow as to Matusow's allegedly perjured testimony. After alleging the facts as to the grand jury investigation and that the testimony was with respect to matter "material to this investigation," the indictment sets forth the specific testimony alleged to be false and known to be false by the defendants.

The sufficiency of each of these counts is attacked upon the ground that it appears from the face of the indictment that the alleged false testimony could not have been material to the grand jury investigation.

An essential element of the crime of perjury under 18 U. S. C. §1621 is that the false testimony be as to a "material matter." A general allegation of materiality such as is made in this indictment will suffice unless the other allegations in the indictment clearly show that the false statements could not have been material. Markham v. United States, 160 U. S. 319; United States v. Hirsch, supra; Woolley v. United States, 9 Cir., 97 F. 2d 258. Defendant must then stand trial though, of course, in order to obtain a conviction the Government must prove at the

trial that the false statements were with respect to material matter. United States v. Lattimore, D. C. Cir., 215 F. 2d 847.

Defendants contend that the allegations of this indictment affirmatively show that the allegedly false testimony could not have been material to the grand jury investigation. Their somewhat tortuous reasoning is in substance this—The grand jury was seeking to ascertain what testimony given by Matusow was false and what testimony was true. Therefore the only matter material to its inquiry was the substance of the memoranda and notes which purported to record the substance of the discussions between defendant Siegel and Matusow regarding such testimony. The grand jury obtained the substance of these discussions through the oral testimony of Siegel and also from the substitute memoranda and notes themselves since there is no allegation that they differed from the originals. Therefore the facts as to when and under what circumstances any individual memoranda or notes were made was not material to the inquiry. Since the allegedly false testimony of these defendants relates only to such facts and not to the substance of the notes and memoranda it is not material to the investigation.

I have referred to the test of materiality in a prosecution for perjury committed before a grand jury as laid down in Carroll v. United States, supra, and United States v. Hirsch, supra. The test is whether the false testimony has a natural effect or tendency to influence or impede the grand jury in its investigation or to dissuade it from pursuing the investigation. As stated in the Carroll case (16 F. 2d at page 953):

> "Its [the grand jury's] investigation proceeds step by step. A false statement by a witness in any of the

steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation."

The grand jury clearly had the right to obtain the original notes and memoranda which were necessary for the accomplishment of a full and thorough investigation. At the very least such memoranda and notes might be used by the grand jury to corroborate or impeach the defendant Siegel's oral testimony with respect to these discussions. Even for that limited purpose, though collateral to the main issue under investigation, they were material to the investigation. Blackmon v. United States, 5 Cir., 108 F. 2d 572, 573.

Since the original memoranda and notes were material to the grand jury investigation, questions and answers with regard to their existence, location, authenticity and date and manner of preparation were also material. Inquiries of this nature are essential steps in the course of a grand jury investigation. Such investigations would rarely be successful unless the grand jury had the power to insist upon truthful answers to questions intended to discover where evidence could be found or tending to impeach or corroborate other testimony given before it. Witnesses testifying falsely with respect to such collateral matters are as guilty of perjury as those who testify falsely with respect to the main issues before the grand jury.

Carroll v. United States, supra, involved a question similar to that presented here. It was alleged that Earl Carroll had testified falsely before a grand jury investigating a violation of the Prohibition Act, 27 U. S. C. A. §1 et seq. The Government claimed that Carroll had held a

party at the Earl Carroll Theatre, features of which were a bathtub containing a beverage variously described as champagne and ginger ale and a lady in a state of complete undress climbing into the tub and sitting there while the guests imbibed. Carroll was asked before the grand jury whether the lady had entered the bathtub, or had been in the tub at all, and he denied that she ever had been. The indictment charged that this answer constituted perjury.

The Court of Appeals of this Circuit rejected defendant's contention to the effect that this false testimony was not material because the grand jury was investigating the nature of the beverage in the bathtub and not the presence or nudity of its occupant and because, in any event, it appeared that the name of the lady was already known to the grand jury through the press. The Court stated (16 F. 2d 954):

> "Clearly one who stepped into the bathtub by smell, sight, or taste, could testify as to whether or not it contained champagne. Thus the materiality of this testimony is made clear • • • . It is no answer to say that, because Miss Hawley's name was published in the newspapers, of necessity the grand jury had knowledge sufficient to call her as a witness. The grand jury's duty was to obtain competent legal proof of a violation of the law. • • • . The plaintiff in error's statements were plainly calculated to dissuade the grand jury from further investigation. It would distort the plain meaning of the word 'material' to hold otherwise. • • • Had he answered the question truthfully, he would have furnished a clue to the grand jury tending to establish a violation of the National Prohibition Act."

Appendix B

It was just as material in the instant case for the grand jury to attempt to locate the authentic original documents concerning the Sjegel-Matusow discussions as it was for the grand jury in the Carroll case to locate the lady in the bathtub. The documents would certainly have been of aid to the grand jury in determining whether or not Matusow had committed perjury, and, if so, on what occasions, and might have led to other clues tending to establish the commission of crimes on Matusow's part. Any details concerning the origin of the documents were therefore material, and if it be established that defendants testified falsely with respect to these matters they plainly could be found guilty of perjury.

There is no merit in the defendants' contention that the allegations in the first count of the indictment (the conspiracy count) necessarily negative such materiality. If these allegations be considered in conjunction with those of the counts now under discussion, they serve to strengthen the counts on the materiality question rather than otherwise.

Nor does the case of Hogue v. United States, 5 Cir., 184 F. 245, which defendants stress, support their position. There an indictment for perjury was dismissed as insufficient because its description of the allegedly false testimony was so inadequate and confusing as to make it impossible to ascertain what false statements defendant was charged with making. The case does not pass on the question of materiality at all. Any confusion as to the grounds of the decision which might have been created by phrases used by the court in its original opinion were cleared up in its opinion on reargument at page 251, where the court stated that "The defect found in the indictment is not in the manner in which the materiality of the evi-

dence is alleged. The defect is that the indictment does not state the alleged false testimony of the defendant." Of course such an indictment is insufficient to charge perjury.

In contrast the indictment in the case at bar alleges in *haec verba* the testimony of the defendants which is claimed to have been false, and alleges that the defendants knew it to be false. It also alleges in so many words that the testimony was material to the grand jury investigation and the facts alleged show that it was material. The perjury counts of the indictment are fully sufficient.

Defendants' motion to dismiss the indictment is in all respects denied.

Dated: New York, N. Y.
May 27, 1957.

FREDERICK VP. BRYAN
U.S.D.J.

APPENDIX C

Opinion of Dawson, *D.J.*, on Motion for Bill of Particulars

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#22546

C 147–346

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO,

Defendants.

MEMORANDUM

Appearances:

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, *Attorney for Plaintiff*, Thomas A. Bolan, Assistant U. S. Attorney, ~~*Of Counsel.*~~

BARENT TEN EYCK, of New York, N. Y., *Attorney for Defendants.*

Appendix C

DAWSON, *D.J.*:

This is a motion for a bill of particulars. All other matters in the notice of motion were disposed of by Judge Clancy in an opinion dated February 20, 1956. He directed that the defendants be given a copy of their grand jury testimony given during the sessions held on March 17 and March 21, 1955. I am advised that the government is furnishing defendants with a copy of the memoranda and notes submitted by them to the grand jury.

So much of the motion for the bill of particulars as seeks to have the government state as to whether certain of the notes and memoranda are the same as those described elsewhere in the indictment (Items IX-A-1, IX-A-2, XI-A-1, XI-A-2, XII-A-1 and XII-A-2) is granted.

All other items sought in the bill of particulas are denied.

Although a broad right of discovery has been extended to civil cases, no such broad right exists in criminal cases up to the present time. The distinction has a logical basis, for in a civil case each side may take the deposition of the other, whereas in a criminal case the government has no power to take the deposition of the defendant. *United States* v. *Carter*, 15 F. R. D. 367 (D. D. C. 1954). The function of a bill of particulars is to inform the accused of the charge made against him with sufficient particularity to enable him to prepare his defense, avoid surprise, and plead his acquittal as a bar to further prosecution for the same offense. *United States* v. *Foster*, 80 F. Supp. 479 (S. D. N. Y. 1948). The particulars sought in the present motion are not necessary for that purpose. The indictment itself sufficiently informs the accused of the nature of the charges made against them with sufficient par-

ticularity to enable them to prepare their defense. The particulars sought in the motion are more in the nature of an attempt to discover the evidence of the government in advance of trial. This is not proper. *United States* v. *Lebron*, 222 F. 2d 531 (C. A. 2, 1955), cert. den. 350 U. S. 876 (1955).

So ordered.

Dated: New York, N. Y.,
April 11, 1956.

ARCHIE O. DAWSON,
U.S.D.J.

APPENDIX D

Opinion of Clancy, *D.J.* on Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#22450 N. C.

Cr. 147–346

UNITED STATES OF AMERICA,

—against—

R. LAWRENCE SIEGEL and HADASSAH R. SHAPIRO,

OPINION

PAUL W. WILLIAMS, Esq., United States Attorney, Southern District of New York, United States Court House, Foley Square, New York, N. Y., Thomas A. Bolan, Esq., Assistant U. S. Attorney, *of Counsel,*

BARENT TEN EYCK, Esq., *Attorney for Defendants,* 15 Broad Street, New York, N. Y.

JOHN W. CLANCY, *U.S.D.J.*

CLANCY, *D.J.*:

The motion to dismiss all of the counts of the indictment is in all respects denied.

The motion to strike language from count 1 is denied.

The motion to examine the grand jury minutes is denied except that the prosecutor will deliver to the defendants' attorney a copy of the testimony of the defendants before the grand jury given during the sessions held on March 17 and March 21, 1955.

The motion for a severance is denied.

The motion for separate trials is in all respects denied.

Dated: New York, N. Y.
February 20, 1956.

JOHN W. CLANCY,
United States District Judge.

APPENDIX E

Summary of Trial Evidence With Record References and Essential Quotations

Parties Charged: Petitioner Siegel

Petitioner Siegel is forty-seven years of age and has practised as an attorney in New York since 1934 in corporate and business matters. From 1944 to 1950 he was a partner in Oseas, Pepper & Siegel and from 1950 to 1954 in Pepper & Siegel (SM 1806-08). He had been counsel to Sarah Lawrence College (SM 1818). In 1938 he had succeeded Hon. Matthew M. Levy in the conduct of an election fraud investigation for the New York State Attorney General and from 1938 to 1942 had been an Assistant Attorney General on the staff of Hon. John Harlan Amen, Special Prosecutor (SM 1808-09). He had been active in the YMHA and YWHA, the Citizens Union, various bar associations and the American Civil Liberties Union and was a member of the board of directors of the New York Civil Liberties Union (SM 1810-14). In his civic work and otherwise Mr. Siegel had been industriously anti-Communist (SM 1816-26). He never at any time knowingly represented a client who was a Communist or a Communist sympathizer (SM 1825-26). He never represented any labor union (SM 1837).

The law firms to which Siegel belonged represented The Nation, a magazine published in New York, and from the end of 1954 until the latter part of 1955 he individually was counsel to The Nation (SM 1828-9).

In March, 1954 an article called "The Informer" had been submitted to The Nation for publication by one Frank J. Donner, and Siegel read the manuscript; to protest

against its publication he wrote a letter to Victor Bernstein, Managing Editor of The Nation (Exhibit E; SM 1840-42). A copy of Siegel's letter was sent to Carey McWilliams, an Editor of The Nation (SM 1842). The following month (April, 1954), Carey McWilliams sent Harvey M. Matusow to see Mr. Siegel and in all Mr. Siegel saw Matusow briefly on six occasions and spoke to him twice on the telephone (SM 1857).

These conversations with Matusow and Mr. Siegel's memoranda and testimony about them constitute the sole activities of Mr. Siegel which were in any way involved in this prosecution.

Parties Charged: Petitioner Miss Shapiro

Miss Hadassah R. Shapiro is thirty-four years of age and substantially all her professional experience has been as Mr. Siegel's associate in his law firms and since 1955 in his individual practice (SM 2329). She has never belonged to any organizations sympathetic to Communisin (SM 2330).

Until the time when Matusow called at Mr. Siegel's office at the instance of Carey McWilliams, Miss Shapiro did not know Matusow; she first saw him in the waiting room of Mr. Siegel's office at 730 Fifth Avenue (SM 2334-36) and spoke to him casually not more than two or three times. Beginning about April 29, 1954 Miss Shapiro took some notes, given her by Mr. Siegel, concerning talks he had had with Matusow; in all she took notes for seven memoranda, on about April 29th, May 3rd, May 14th, May 21st, June 18th, August 20th and November 3rd, 1954 (SM 2337-38). Siegel either gave Miss Shapiro word for word notes of an aide-memoire, or (Miss Shapiro being

a lawyer but not a qualified stenographer) else he would tell her the substance of his conversation and she would prepare a memorandum of it in her own words (SM 2338-39).

Siegel also dictated a memorandum dated April 21, 1954 to his secretary Mrs. Mary Manna (SM 863). Some of the others Miss Shapiro composed from her own rough notes of the substance of conversations and the names of conferees (SM 2338-34, 2341-42) which she took, either in a stenographer's notebook or on whatever was handy, such as a yellow foolscap pad. Notes of the latter type were discarded after she had composed the aide-memoire upon the typewriter (SM 2343-46). Not any of her notes of Matusow conversations had been taken in permanent notebooks, but Miss Shapiro had no occasion to remember this and a year later, in 1955, when she was first asked about her notes for the aide-memoire, she was not, regrettably for her, aware that none of the notes had been preserved (SM 2346-47).

After typing one of the aide-memoire Miss Shapiro did not exhibit it to Siegel (SM 1912, 2347), but simply placed it in a personal file of his, Matusow not being a client of the office (SM 1893, 2347-47a). The names of three clients of Siegel, with whom he was in conference on some of the occasions when Matusow happened in, were mentioned to Miss Shapiro and she typed those names in two of her memoranda of Siegel-Matusow conversations. (SM 2354).

Miss Shapiro's involvement with the prosecution derived exclusively from her having taken the notes for, and typed, Mr. Siegel's aide-memoire touching conversations with Matusow.

Appendix E

Persons Charged: Mary Manna

Mrs. Mary Manna was named as a co-conspirator but not indicted.

Mrs. Mary Manna's notes of Siegel's April 21, 1954 memorandum were physically excised from her notebook on March 20, 1955; she told the grand jury that she tore the notes out of the book and gave them to Mr. Siegel (SM 866).

What happened before Mary Manna tore the original notes out of her notebook, she testified as a prosecution witness at the trial (SM 870-874), was:

> " • • • I deleted names that were in the memo that had no relation whatsoever to the subject matter of the memorandum.
>
> Q. Who told you to delete the names? A. Mr. Siegel.
>
> Q. Did he indicate what was to be deleted from the original notes? A. Yes. I had read the notes to him and when he discovered that these names were in the memorandum, as I say, that had no relation to the subject matter.
>
> The Court: You mean the notes? You said they were in the memorandum. They were in your stenographic notes?
>
> The Witness: Yes, in the original stenographic notes, and when he discovered that these names were there, he says 'My God, we can't use these names because it would not be good for these clients,' and it had nothing to do with the subject matter. It just would hurt these people to have the names in that memorandum, and he felt that it was his duty."

Appendix E

The events of the day described above, Sunday, March 20, 1955, are among those alleged as overt acts in the conspiracy charges of Count I of the indictment (7a-13a)—upon which the jury acquitted both petitioners; are the substance of Count II (13a-14a) charging that the defendants corruptly influenced and tried to influence Mary Manna to destroy the notes dictated to her by Mr. Siegel and create the substitute notes and testify falsely about the memorandum of April 21, 1954—upon which the jury acquitted both petitioners; and, in so far as upon the same Sunday, March 20, 1955, stenographic notes were recreated for the memoranda dated June 18, 1954 and November 3, 1954, the events of that day are also the basis for the charges that the notes were corruptly created for the purpose of submitting them to the grand jury as the original notes and that Miss Shapiro did submit them to the grand jury as such original notes, found in Count VI of the indictment (19a-20a)—upon which the jury acquitted both petitioners.

As part of the same verdict, however, the same jury found both guilty upon Count IV of the indictment, the essential allegation of which was that petitioners destroyed the April 21 notes and had Mrs. Manna replace them by others, on March 20 (17a).

Mr. Siegel's Professional Situation at the Time of the Matusow Conversations

When McWilliams of The Nation sent Matusow to visit Mr. Siegel, the latter was spending each morning and the first part of each afternoon at the offices of his law firm, Pepper & Siegel, at 55 Liberty Street; he was spending the rest of the day at 730 Fifth Avenue where he was endeavoring to build "an uptown office" (SM 1858). A

theatrical agency client of Pepper & Siegel had offices at 730 Fifth Avenue and permitted Mr. Siegel the use of one small room.

Beyond its lack of space and accommodations, the one-room quarters at 730 Fifth Avenue had no window (SM 2660), and the only waiting space for a visitor to Mr. Siegel was the common reception room (SM 2661).

Mr. Siegel preferred to see clients at a restaurant called Blair House which was around the corner from his 730 Fifth Avenue quarters (SM 1867). He had two clients, Miss Gloria Swanson and Col. Lewis L. Bredin, whom he sometimes saw at Miss Swanson's apartment, 920 Fifth Avenue at 73rd Street (SM 1867-68).

Col. Bredin is a wealthy, retired businessman (SM 2804) who has been spending about half his time in Paris (SM 2804, 2819-20); Mr. Siegel had a power of attorney from Col. Bredin (SM 2819). In addition to being the Colonel's general counsel and financial advisor (SM 2822), Siegel represented him in extensive matrimonial litigations with Mrs. Bredin (SM 2806-07, 2808-09). In April, 1954 Mrs. Bredin had entered a money judgment against her husband and his whereabouts and the situs of certain of his assets were being kept secret (SM 2017-18).

In 1954, and before and since, Col. Bredin has been intimately acquainted with Miss Gloria Swanson (SM 2809), would go to her apartment quite frequently (SM 2825), and regarded his relationship with her as a matter of his own "privacy or personal secrecy" (SM 2817). He and Miss Swanson appeared in public together under certain conditions, but Miss Swanson sometimes introduced him under a name other than his own (SM 2830).

Also a client of Mr. Siegel, Miss Gloria Swanson is one of the world's most famous motion picture actresses; in 1954 her many business interests included a contract with Puritan Dress Company which depended on the value of her good name for sales promotion purposes (SM 2831-32). In 1954 she was about to go on tour in connection with promoting "exercise and food, and so on" (SM 2834). Miss Swanson's connection with the dress company contained a "morals clause" permitting cancellation in event of damage to her reputation (SM 2017).

A third Siegel client was a corporate venture in a mechanical parking device called "Pigeon Hole" (SM. 989) in which one Michael Shore was interested (SM 988) and in which Miss Swanson also had a monetary interest (SM 2831). In the spring of 1955 Michael Shore, a client of Mr. Siegel (SM 988, 2042), had had a nervous breakdown and was under medical treatment (SM 2044). In March of 1954 Shore was involved in a bankruptcy proceeding in Chicago which was still going on in 1955; he had made an assignment for the benefit of creditors, and the revelation that he was in New York conferring about an interest in the Pigeon Hole enterprise might have exposed him to an action (SM. 1012-1015).

In the course of persistently trying to see Siegel in the spring of 1954, Matusow had intruded upon him during interviews with each of these clients, and Miss Shapiro had recorded the intrusions and named the clients in the aide-memoire she typed from Mr. Siegel's reports to her; and Mr. Siegel had dictated to Mrs. Manna and Mrs. Manna had duly recorded a visit which Matusow paid uninvited to Mr. Siegel at Miss Swanson's apartment, where Matusow had encountered Col. Bredin in Miss Swanson's company (SM 2809-12, 2833-37, 1889-97, 1911-13; exhibit 10, p. 1314, exhibit 11, pp. 1482-83).

Appendix E

Charges Against the U. S. Attorney— The Dimock Hearings

In January, 1955, Harvey M. Matusow, ex-communist, F. B. I. informant and Government witness, recanted portions of testimony he had given in two Communist trials and published a small book entitled "False Witness." The gist of Matusow's tale, which he told in his affidavits in the *Flynn* and *Jencks* cases, was that he had lied in identifying certain people as Communists and that Assistant United States attorneys (especially Roy M. Cohn) had helped formulate his false testimony. See *United States* v. *Flynn*, 130 F. Supp. 412 (S. D. N. Y. 1955); *Jencks* v. *United States*, 226 F. 2d 553 (5th Cir. 1955).

A motion for a new trial was made by the defendants in *U. S.* v. *Flynn*, a Smith Act conviction in the Southern District of New York, on the basis of Matusow's affidavit of recantation sworn to January 31, 1955.

The motion came on before Judge DIMOCK and he set the matter down for hearing early in February, 1955. Roughly simultaneously therewith the U. S. Attorney for the Southern District of New York began an investigation before a federal grand jury of Matusow's recantation and the circumstances under which it occurred. George H. Bailey, Esq. testified for the Government in the trial herein that he had been one of the Assistant U. S. Attorneys working with that grand jury. Asked its purposes, he testified (SM 1035):

> "One was to determine whether Harvey Matusow's original testimony in the Flynn trial was true, or whether his recantation was true. And in connection with that we investigated in some detail the circumstances under which the recantation occurred."

Appendix E

The first subpoena issued was for Matusow himself. The grand jury investigation paralleled the hearings before Judge DIMOCK and the two Assistant U. S. Attorneys who conducted the grand jury inquiry also assisted the Government before Judge DIMOCK. They were Mr. Bailey and Mr. Thomas A. Bolan.

In the course of their investigation these Assistants learned that Matusow had stayed in a hotel in Dallas during 1954 and they obtained a schedule of all toll calls placed from his room. One of these was to Siegel at his office in New York (SM 1546, 1938). Bolan ascertained that Siegel was counsel for The Nation (SM 1549). Bailey caused a grand jury subpoena *duces tecum* to be issued to Pepper & Siegel and a personal subpoena to Siegel (SM 1036, 1544). Upon the basis that Siegel was counsel for The Nation it was determined that he would not be interviewed privately but would be taken directly into the grand jury room, which was done when he answered the subpoena on March 3, 1955 (SM 1542-43).

Grand Jury Testimony

Upon his first appearance on March 3rd, Mr. Siegel described generally his contacts with Matusow and what was said by Matusow (Exhibit 2).

The following proceedings then took place before the grand jury (Exhibit 2, pp. 750-52):

"*By Mr. Bailey*:

Q. Did you dictate any contemporaneous memorandums in connection with your discussions with Matusow? A. Yes, I have. My problem is that our office is at 55 Liberty Street. For the past nine months or

so, the firm, which has since been dissolved, was developing an uptown office at 730 Fifth Avenue. Practically all of our files have been down at 55 Liberty Street. I did get together some stuff downtown, and I am trying to get it all together, and I didn't want to give you any partial material.

Q. But you are undertaking to gather that material as quickly as possible? A. Yes. I should say, I certainly won't be beyond tomorrow afternoon. Now, *he did meet two clients of mine.*

By Mr. Bolan:

Q. What are the names of those clients? A. He came around to my office, and they told him I wasn't there, and he happened to find out where I was, and he came up to see me. *I represent Gloria Swanson,* and I don't know whether it was the name, or what, but he tapped on the door, and he came in, and I— *There was another client of mine who was present then,* and he spoke and said, 'Hello,' and then he left.

Q. It was just a casual meeting? A. Yes. I think he probably came because he had heard the name and was interested. I should say this: that I understand when she was down in Dallas, on a performance tour, he telephoned her to welcome her to the city. * * * She'd gotten a key to the city from the mayor, but he called her up to welcome her to the city.

Mr. Bolan: I think we can excuse Mr. Siegel now." (Emphasis added.)

Both Bailey and Bolan considered that Siegel would be a probable Government witness before Judge Dimock (SM 1042, 1103). Bailey walked out of the grand jury room

with Siegel and thanked him for his assistance (SM 1076, 1938). Siegel testified that he said (as he had twice, before testifying) that he had a problem in connection with his memoranda which he wanted to discuss privately. What he wanted to discuss was an accommodation which would eliminate any mention of his clients' names. He was promised an interview but it never took place (SM 1938-39).

Siegel was asked to prepare a chronological memorandum of his talks with Matusow so that the Government attorneys could prepare witness sheets for his examination before Judge Dimock (SM 1943, ex. 20).

In order to do this Siegel asked Miss Shapiro and Mrs. Mary Manna to find all office material on Matusow's calls and visits. The client's receptionist at 730 Fifth Avenue was asked for her recollections. Miss Shapiro telephoned Bailey to confirm that what he wanted was not an affidavit by Siegel or separate memoranda, but a chronological memorandum for use in preparing witness sheets (SM 1944-49).

Between March 4th and March 8th, 1955 Siegel and Miss Shapiro were busy in the preparation of a chronological memorandum of some fourteen pages (Exhibit 6) which was submitted to Bolan on March 8, 1955 (SM 1956-57).

In the course of preparing the chronological memorandum Siegel and Miss Shapiro observed that:

> (1) Three of the aide-memoire contained the names of the three clients who were in no way connected with the Matusow interviews: the April 21st memo (Exhibit 32) mentioned Matusow's visit to Gloria Swanson's apartment where he found her and Col.

Bredin with Siegel; the June 18th memo (Exhibit 32) mentioned Michael Shore's presence at Blair House with Siegel; and the November 3rd memo (Exhibit 32) mentioned Matusow's call to Miss Swanson in Dallas;

(2) Of the remaining five memoranda two—those of April 29th and May 3rd (Exhibit 32)—had typographical errors or stylistic deficiencies due to the haste in which they had been typed and

(3) Three of the eight aide-memoire—those of May 14th, May 21st and August 20th (Exhibit 32)—required no changes.

The thought that any of the aide-memoire needed change had to do with the prospect that Siegel would be a witness in hearings before Judge DIMOCK where he would be examined in chief by the U. S. Attorney (Judge LUMBARD) and would then be cross-examined by counsel for Elizabeth Gurley Flynn and the other twelve defendants in the Flynn case, whose chief trial counsel was Harry Sacher, Esq. (SM 1975-76; 130 F. Supp. 412). The airing at public hearings before Judge DIMOCK of the facts that Col. Bredin and Gloria Swanson were seen together at Miss Swanson's apartment, and that Michael Shore was in New York with Mr. Siegel, conferring about an interest in the Pigeon Hole venture, would not add anything helpful to the Government (SM 1950).

The memoranda of April 21, June 18, and November 3, 1954 were altered to eliminate the names of Gloria Swanson, Colonel Bredin and Michael Shore, with the deletion of only the language connected therewith (SM 1955, 2042, 2382). The memoranda of April 29 and May 3, 1954 were retyped to make corrections in style or typography only (SM 2037,

2399-2400). Three of the eight memoranda were left unchanged and not retyped (SM 2400-2401, 2406).

That the Government was preparing Siegel as a witness in the hearings before Judge DIMOCK, and that further grand jury testimony was not in prospect when the clients' names were deleted from Siegel's memoranda (SM 1930, 1974-1975, 2368), is corroborated by the grand jury proceedings of March 3rd (Exhibit 2 pp. 747-748; Bolan examining Siegel):

"Q. Do you say that if given more time you would be able *to more fully reconstruct your contacts with Matusow*—is that correct? A. Let me see: He wrote a poem to me, which he left at my office, which I should be able to find. Also, what I can do is this: I am pretty sure that if we go through the girls' stenographic books, and all of my personal files, and perhaps THE NATION files, and my miscellaneous material, I should be able to do the following for you: To pinpoint precisely the days that I saw him and *to give you, I think, a reliable and correct chronological story of what the things were that we talked about* when we met.

Q. *I don't think it is necessary that you come before the Grand Jury again for that purpose. If you will deliver that material to me, I think it would be all right*, unless the Grand Jury would like to have it.

A Juror: Did you keep notes of your conversations with Matusow?

The Witness: I am in the habit of dictating memoranda on practically everything I do, qualified by this reservation: Sometimes you don't have the time in an office, particularly when you are engaged

in litigation, to make all of the notes you want to make; but I am pretty sure I will have a creditable and complete picture to present.

A Juror: Wouldn't that be subject to the reservation that if anything arises from your examination that is strongly at variance with anything that your recollection has caused you to say to us, that might be brought before us?

Mr. Bolan: Yes, subject to that reservation" (Emphasis added.)

Preparation of the chronological memorandum (Exhibit 6) and the retyping of five of Siegel's eight aide-memoire were completed before Siegel was recalled as a grand jury witness on March 17 (SM 767, 1956-1958; 2395).

Siegel personally delivered the chronological memorandum to Bolan on March 8. Bolan testified that he and Siegel "had a discussion as to his original memoranda. He said—he explained what they were. He said he had them available and would produce them to the United States Attorney. And I told Siegel in the event that he was a witness in the Flynn hearing we were to have those original memoranda; we could not have used these chronological memoranda" (SM 1163). Bolan further testified that on the same occasion on March 8 Siegel told him that there were two kinds of "original memoranda"—those typed at the time of his meetings with Matusow and others typed recently (SM 1104).

Aside from telephone calls to change the date of his proposed testimony before Judge Dimock (Bolan, SM 1165), Siegel next heard from the U. S. Attorney shortly before March 17. Then, for the first time since he had

testified on March 3, Siegel was told that he would again appear before the grand jury and was asked to come before it on March 17 (SM 1168). This happened shortly after Bolan notified Siegel that the Government had decided *not* to call him as a witness before Judge DIMOCK (SM 1168).

Prior to Bolan's telephone call of March 15th, Miss Shapiro had become ill and was away from the office until the afternoon of March 18th (SM 1982, 2418). The memoranda as typed in the first place were on yellow draft paper with no carbon copies; after March 3, 1955 five of the eight memoranda had been retyped but on the same kind of paper; Miss Shapiro had thrown away the original memoranda as she retyped them; there thus remained some original and some retyped memoranda, which Siegel could not differentiate without Miss Shapiro's help (SM 496 [exhibit 3, pp. 1093-1094]). Because of her illness Siegel asked Bolan to postpone his own reappearance before the grand jury; Bolan declined; Siegel appeared on March 17, 1955 and tried to answer questions as to when the various yellow memoranda which he produced had been typed (SM 1982-83, exhibit 3). He testified that he was positive that certain of th m were the memoranda as originally typed; he knew but did not testify that the one dated April 21, 1954, mentioning Matusow's visit to Miss Swanson's apartment, had been retyped to delete the reference. He testified that as to some of the memoranda Miss Shapiro "went to her books and spoke to me and reconstructed her notes, but I can say on my oath that all of these are exactly what I told her and dictated to her at the time. I have checked with her and she tells me that is so" (SM 493-94 [exhibit 3, p. 1092]).

Appendix E

On Saturday, March 19, 1955, the first day after her return to the office, petitioners had a telephone call from Bolan asking to have the stenographer who had taken the notes for these memoranda come to the Court House on Monday morning, March 21st, with her notes (SM 2436). As a result of her conversation with Bolan Miss Shapiro had the impression that she had committed herself to produce for Bolan stenographic notes for the memoranda (SM 2478). As a matter of fact the only such stenographic notes then in existence were Mary Manna's notes for the April 21, 1954 memo (SM 2439-40). Either by chance or due to the confusion arising from the use of two separate offices by Pepper & Siegel in the spring of 1954, Miss Shapiro's own notes for the Matusow memoranda had not been preserved; but at the time when she spoke to Bolan on March 19, 1955 Miss Shapiro did not know it and neither did Siegel (SM 2438-39).

On Sunday, March 20, 1955 Siegel asked Mary Manna to meet him at his home with Miss Shapiro (SM 875). At this meeting of March 20, Siegel kept falling asleep, being ill with a kidney ailment which had absented him from his law practice during parts of two months in January and February 1955 (SM 1994-95). Miss Shapiro, not recovered from a virus infection which had kept her from the office the previous week, was unnerved by the implication of her telephone conversation with Bolan. Whether at the suggestion of Miss Shapiro (SM 2451-53) or of Siegel (SM 870-872), Mrs. Manna rewrote her notes for the April 21st memorandum word for word except for deleting the names of Miss Swanson and Col. Breidin (*id.*) and the related references to these clients, but not "a single word recording any part of the conversation between Matusow and the defendant Siegel" (SM 917-919).

The stenographic notes so replaced were torn out of Mrs. Manna's notebook and destroyed on March 20, 1955 (SM 805).

Also on March 20 Miss Shapiro made stenographic notes for *parts* of other aide-memoire by simply writing down stenographically what she saw on the typewritten sheet (SM 2464-65). Siegel was not aware that Miss Shapiro was going to do this and when he heard about it later told her that she was "nuts" to have done it (SM 2006A-10).

No stenographic notes were created for any part of the memorandum of May 3rd which recited that on that date Matusow told Siegel "that he had frequently not testified truthfully for the government in the Smith Act cases and in the other hearings in which he had been a witness" (Exhibits 15, 16, 17 & 32).

It was the statement by Matusow to Siegel with reference to false testimony "in the Smith Act cases" (in fact Matusow had testified in but one Smith Act case, the *Flynn* trial [SM 1553]) which, finding its way into the chronological memorandum (Exhibit 6, pp. 1, 3), caused Bolan to conclude that he "thought that this testimony would be more favorable to the 12 defendants" than to the Government (SM 1160-61), following which Bolan decided not to use Siegel as a witness in the *Flynn* hearing (SM 1168) and instead of that to have him back before the grand jury.

On March 21st Miss Shapiro testified falsely that the stenographic notes produced by her had been made at the time of the various memos to which they related (SM 2462, 2600-01).

On the afternoon of March 21st Bolan telephoned Siegel and invited him to make any corrections in his own grand jury testimony that Siegel thought should be made and at the same time asked Siegel to have Mary Manna attend again before the grand jury the following morning (SM 1114).

On the night of March 21 Siegel and Miss Shapiro consulted former District Judge SIMON H. RIFKIND with reference to the deletions in the memoranda and the fact that these had not been explained to Government counsel (SM 2057-58, 2086-90); upon Judge RIFKIND's advice Siegel sent Judge LUMBARD a telegram requesting an opportunity to clarify his own testimony and that of Miss Shapiro before the grand jury (SM 2059, exhibit 24).

When the telegram was received at the United States Attorney's office on the morning of March 22 Judge LUMBARD was out of the State and when Siegel got to the United States Attorney's office he met Bolan who, instead of taking Siegel before the grand jury (which was in session) in effect compelled Siegel to submit to continuous examination for about seven hours in a series of interrogation chambers, where he was questioned by Bolan and other Government counsel in rotation (SM 1116-21, 1198, 1607-17, 2059, 2073, 2246). On the morning when this interrogation commenced Siegel was feverish and too ill to eat, having been sleepless all night due to his kidney ailment (SM 2282-83).

Siegel had gone to the Court House unaccompanied by counsel, but due to his illness Mrs. Siegel went with him; she suffers from a chronic heart ailment and Siegel was disturbed by the fact that on arrival he was led away from her and she had no idea where to locate him; as the hours

of continuous questioning wore on, this worry increased (SM 2072, 2282-84).

Nothing that was said by Government counsel or Siegel was recorded until one o'clock of the afternoon of that day (SM 1198). When the Government did call stenographers, much of what was said was left "off the record" and the question and answer statement produced by the Government (Exhibit 39 for iden.) was inaccurate and incomplete (SM 1688-92, 2281).

When the questioning stopped Siegel was given a subpoena returnable the following morning; however, on the evening of March 22 he was so ill that friends called a physician who ordered him to bed; he was confined to his home until April 4. On two occasions before then a U. S. Public Health Service physician was sent to examine him and presumably certified to Siegel's incapacity to testify (SM 1300-11, 2059-60, 2068, 2070-71, 2074-75, 2086-87, 2095, 2113).

On April 4, 1955, Siegel appeared before the grand jury and testified:

> "• • • I have been ill and still am. I don't think I've got the strength to testify today. I respectfully ask your indulgence to be excused today and come back tomorrow to testify at length" (SM 1298).

Bolan replied,

> "Well, I think you will conserve your energy by making your answers as brief as possible, Mr. Siegel" (SM 1299).

Siegel undertook to correct his earlier grand jury testimony (SM 1323-24, 1325 ff.).

Appendix E

Following March 22, Miss Shapiro had appeared before the grand jury on March 28 (Exhibit 11) and March 29 (Exhibit 12). She also appeared before the grand jury on April 4 (Exhibit 13). Thereafter Siegel appeared on June 24 and June 29 (Exhibits 4, 27).

Petitioners' Explanation of Their Actions Was at All Times Protection of Innocent Clients

The only direct explanation comes from the testimony of petitioners themselves—before the grand jury and at the trial—and this is not contradicted by any indirect or circumstantial evidence (SM 3267).

Each defendant on trial took the witness stand and was cross-examined at great length.

Siegel testified before the grand jury that he never had any intent to mislead the grand jury in its investigation of Matusow by attesting to Matusow's credibility. On March 17, 1955, he testified to his own impression of Matusow:

> "I felt at all times that this guy was just talking, just to be heard. If I ever had any feeling that this man was saying anything at all that was credible or entitled to attention, or entitled to respect as the statement of a person of any integrity or fidelity to the truth, I would have taken a different attitude towards him. As it was, I felt that this guy was just pestering me to give him some money or to offer to lend him some money, and I was just trying to get rid of him" (Exhibit 3, p. 1099).

Siegel explained his reasoning in deleting the names of clients from his memoranda:

"Q. Did you have a discussion with Miss Shapiro as to typing these memos that you submitted to the Grand Jury? A. Yes.

Q. And what was that discussion? A. Concern about the elimination of clients' names, names of clients who had nothing at all to do with the subject matter of this investigation, and whose names I did not want to have dragged in in any way into this investigation.

Q. I take it there were original memoranda bearing the same dates as the memos you submitted to the Grand Jury? A. Yes, sir, in each case.

Q. And where are those memos? A. They were torn up, sir.

Q. When? A. It is my best impression that they were torn up as we were preparing the chronological memorandum, and thereafter. There came a time when I was advised by the Government representative that I would not be wanted as a witness in the Flynn proceeding, and we thought that the question of the memoranda was no longer of any import, and somewhere along the line those memoranda were destroyed" (Exhibit 4, April 24, 1955, pp. 03125-03126).

See also Siegel's trial testimony, at SM 1950, 1955, 2041-18, 2042-44.

Miss Shapiro similarly explained the defendants' reason for eliminating clients' names from the typed aide-memoire and from the notes:

"A. Because of the names involved and pending matters of litigation, we both knew that it would be a violation of our duty to our clients for those names to be disclosed at any place" (Exhibit 10, March 22, 1955, p. 1314).

See also Miss Shapiro's trial testimony, at SM 2354-61, 2385-88, 2499-2500, 2512-15.

Petitioners adhered to a belief that they had no right to disclose the names of their clients, even when asked for them by the grand jury after informing the grand jury that the aide-memoire had been changed. Miss Shapiro testified as follows on March 22, 1955, when asked for the names of the clients which had been removed from the April 21, 1954 aide-memoire:

> "Q. All right. What is the name of the client or clients involved in litigation? A. If you please, sir, without a direction from a Court I don't know that I am at liberty to disclose that name. I will disclose it to the Court, but unless so directed I think it would be a violation of my duty to my client, to disclose the name" (Exhibit 10, p. 1316).

And again on March 28, 1955, when asked for the name of the third client:

> "Q. Well, now, will you again explain to us why you think you're bound not to reveal his name? A. The disclosure of any information with respect to a client, which has been communicated by the client to an attorney or with respect to which the attorney has acquired knowledge in his work for a client, is forbidden if such disclosure may, in the opinion of the attorney, have any adverse effect upon the client's interests. It's better expressed, I think, in the statute and in the canons of ethics, sir" (Exhibit 11, p. 1525).

Siegel also declined to disclose his clients' names until waivers had been obtained from them (SM 1620, 2060).

Appendix E

The question whether Miss Shapiro had what Judge McGohey called "a wilful and evil intent to obstruct the grand jury's investigation" (SM 1891) is affected by the condition of her health, which is corroborated by other events. She testified before the grand jury on March 21, 22, 28 and 29 and April 4. On March 21, she was seriously ill with a virus infection, and on March 22 collapsed in the grand jury room and was taken by ambulance to the Beekman-Downtown Hospital; she was suffering from salicylate poisoning due to her excessive consumption of aspirin tablets (SM 2445, 2497). On March 28 and 29 and April 4 she was at all times under the influence of chlorpromazine hydrochloride and dexedrine administered by her physician to make these appearances possible. Miss Shapiro's confused mental state appears in the grand jury minutes, as when on March 28 she testified that she had retyped the memorandum of April 21, 1954 on Sunday, March 20, 1955 (SM 654); she should have known the fact to be otherwise, having herself retyped all five memoranda and knowing that they had been delivered to the same grand jury on March 17, three days before the date when she now said they had been retyped. Various of her other grand jury statements were plainly not accurate (SM 2592-94), and the inaccuracies were in no way beneficial to her position and could not have been advanced to support any statements in the retyped memoranda (SM 2520, 2531, 2610-11).

Miss Shapiro was examined by a physician sent to her home at Bolan's behest on March 25. Her physical condition was at all times subject to medical check (SM 2497). There is no question in the record that she was ill on Sunday, March 20, when she believed that she had to pro-

duce stenographic notes to satisfy Bolan, two days before she was hospitalized (SM 2445-46).

Through all her ordeal Miss Shapiro adhered to the principle that she could not disclose information about clients without a ruling from the court; before the grand jury Miss Shapiro lost a debate with Bolan (the provisions of New York Civil Practice Act §353 notwithstanding) as to whether the attorney-client privilege forbade her to disclose confidences of persons who were Siegel's clients, not hers (SM 605, 617 [Exhibit 10, March 22], 659, 708-09 [Exhibit 11, March 28]). On March 22 Miss Shapiro declined to disclose the names of Miss Swanson and Col. Bredin (SM 605-06), which she did disclose on March 28 after Siegel had their waivers (SM 2815-17, 2841-42, 2844-45). But on the latter date she declined to name Michael Shore because his presence at "the place where the conversation between Mr. Siegel and Mr. Matusow took place" was a confidential communication. She said:

> "I am sorry, sir, that is a matter on which I must make the judgment. I'll certainly be willing to ask for a ruling from the Court" (SM 692).

The next day Judge THOMAS F. MURPHY directed her to reveal the client's name (SM 2499). When she again declined, a contempt citation was applied for, returnable April 1. Michael Shore came unexpectedly to New York on March 30, called Siegel's office, and waived the privilege (SM 994, 1011); Miss Shapiro then disclosed his name to the grand jury (SM 2506-11).

Appendix E

The Use of the Grand Jury to Discredit Petitioner Siegel

At the trial, petitioners offered to prove what was contained in affidavits submitted upon their motion to dismiss the indictment and for other relief (77a-89a, 103a-123a): that throughout April, May and June of 1955 Siegel's legal representatives—Israel B. Oseas, Ernest Angell, and Edward J. Ennis (who acted while Mr. Angell was in Europe) constantly received word from Bolan that Siegel's ordeal could end only if he confessed to having taken part in a campaign to bring about false recantations by Matusow. Siegel did not want to be indicted and risk forfeiting the reputation and standing at the bar and in the community which he had earned by a lifetime of diligence, arduous labor, and high character. He did not want Miss Shapiro to be indicted. But he could not buy his peace with a lie (82a).

That any such confession by Siegel would have been a lie appears from Judge Dimock's opinion in the *Flynn* case which came out on April 22, 1955, nearly 3 months before petitioners were indicted. See 130 F. Supp. 412, 416.

On July 13, 1955 the United States Attorney announced to the press that the grand jury had voted indictments against Harvey M. Matusow, Martin Solow of The Nation, Siegel and Miss Shapiro. (In fact there were three separate indictments.) Siegel and Miss Shapiro were identified in the press as "Nation aides" and Siegel as "The Nation's general counsel." This gave the impression of a single "Nation" conspiracy (including Siegel) to bring about Matusow's recantation. (New York Times, July 14, 1955, p. 12, col. 3. N. Y. Daily News, July 14, 1955, p. 5, col. 2.)

Appendix E

The U. S. Attorney's office had been represented by Bolan and Bailey. In March 1955 when they first met Siegel, who was 45 years of age and had practiced 21 years (SM 1806), Thomas A. Bolan was 31 years of age, had practiced exactly four years (SM 1096), and had been an Assistant U. S. Attorney for 18 months (SM 1096-97). George H. Bailey was 30 years of age and had practiced five and one-half years; he had been an Assistant U. S. Attorney two years (SM 1034). Bolan and Bailey had equal responsibility in assisting the Matusow grand jury (SM 1047, 1056, 1057). Simultaneously they were assisting Judge LUMBARD in the hearings before Judge DIMOCK.

Upon first hearing Siegel testify before the grand jury on March 3, 1955 these young assistants were hopeful that in him they had a Government witness against the movants before Judge DIMOCK (SM 1076-77, 1144-48); based on the fact that Siegel did not quote Matusow as confessing in 1954 that he had lied in his Smith Act trial testimony (SM 1148), they saw some usefulness in Siegel's evidence (SM 28-29—Government's opening to the jury). But when Siegel produced the chronological memo which Bailey had asked for, the details of Matusow's talks with Siegel revealed Smith Act perjury as one subject. This "disturbed the Government [Bailey and Bolan] considerably" (SM 32. See also SM 39).

The grand jury minutes show that Siegel was not asked before the grand jury on March 3 whether Matusow had confessed any such perjury; he was not asked, even, in what trials Matusow said he had been a witness (Exhibit 2).

Siegel was to have been "a Flynn witness for the Government" (SM 1082). As Bolan testified (SM 1160-61):

"I told Mr. Siegel that after his grand jury testimony on May—on March 3rd that I thought his testimony would be favorable to the Government, but after reading the chronological memorandum I thought that this testimony would be more favorable to the 12 defendants, but it was the Government's purpose to present any evidence on the issues at the Flynn hearing to Judge Dimock and that, therefore, Mr. Siegel would probably be called as a witness in the Flynn hearing, to testify as a witness."

Bolan personally handled the Siegel prosecution up to the time he left the U. S. Attorney's office to go to work for Roy M. Cohn in private practice (SM 1097, 1514, 1519).

Bolan had concluded on March 21 that Mr. Siegel's testimony was damaging to the Government in the DIMOCK hearings but that the Government would have to produce it before Judge DIMOCK anyway (SM 1103); but then the conclusion Bolan reached 15 minutes later on the same day, that the stenographic notes for Siegel's memoranda were suspect, caused a decision to recall the stenographers before the grand jury (SM 1584) and the Government's embarrassment was ultimately relieved altogether when Bolan reached the conclusion "that the notes were spurious as were the shorthand memoranda" (SM 1585). The whole matter was never brought to Judge DIMOCK's attention (*ibid.*).

Later Bolan told Siegel's attorney, Israel B. Oseas, that Bolan did not believe Siegel's statements about his relations with Matusow (SM 1648-50). Bolan charged that Siegel's reason for revising his memoranda "dealt with his relationships with Matusow" (SM 1649-50).

Appendix E

Bolan testified at the trial in January, 1958 that: "After March 22nd I did not believe Mr. Siegel's statement that the only reason those memoranda were revised was to protect clients. I did not believe that and I do not believe that to this moment" (SM 1687).

The principal ground advanced for the Government's notion that Siegel was involved with Matusow was that Siegel and his aide-memoire presented *the earliest evidence in point of time* of any claim by Matusow that he had testified falsely. Bird-dogging this charge, Siegel found in his own aide-memoire dated May 3, 1954 (Exhibit 32 p. 2, lines 3-9) references to other names from whom Matusow had sought financial aid before May 3, 1954; one of these was Morris L. Ernst (*ibid.* line 5). At first unable to reach Mr. Ernst (because he was abroad) Siegel finally saw him on April 27, 1955 (85a) and ascertained that Matusow had talked to Ernst months before his first talk with Siegel (85a)—in fact *the previous year*, around November, 1953, as Ernst swore in his affidavit (115a):

> "Around November, 1953, and certainly before January 1, 1954, I was consulted by Harvey M. Matusow with respect to a book he proposed to write. He told me that he had given false testimony to our Government and our courts in various legal processes against alleged Communists. I interviewed him sufficiently to be convinced that with him, as with many other people who are wobbly as to truth, a competent objective scrutiny of their minds and statements would result in a residue of truth. Therefore I commended for his consideration the publication of a book which, as I told him, might well be entitled 'Confessions of a Rogue."

Appendix E

Although Siegel made Ernst's information available to Bolan, as a result of which Bolan saw Ernst on May 4, 1955 and Ernst volunteered to testify before the grand jury, Ernst did not hear from Bolan again; *he was never called before the grand jury* (116a-117a).

(At the hearings before Judge DIMOCK on March 21, 1955 Bishop G. Bromley Oxnam testified that on April 27, 1954 *Matusow had told him that he had lied repeatedly.* See 130 F. Supp. 412 at 416. But the trial court ruled out any references to any of the others to whom Matusow had told his story [SM 139-40, 1161].)

At the trial the Government sought to show through the grand jury foreman (126a-130a) and the two Government attorneys, Bailey (134a-135a) and Bolan (135a-138a) that the grand jury was attempting to find out everybody who had been in touch with Matusow, and Gloria Swanson, Colonel Bredin and Michael Shore had been in touch with him or present at some conversations of his. Judge MCGOHEY ruled (160a) that this was the grand jury's purpose.

If, as petitioners sought to show, this was not in fact the grand jury's purpose, then the recalling of petitioner Siegel and the calling of petitioner Miss Shapiro before the grand jury was for the purpose of discrediting Siegel's evidence and giving him the choice between some kind of fictional "confession" or indictment.

The excluded evidence tended to show that the U. S. Attorney's office recalled Siegel before the grand jury on and after March 17, 1955 not to ascertain anything about Matusow's recantation, but to make him confirm Bolan's suspicions or else be indicted and thereby excuse the suppression of his evidence from Judge DIMOCK.

Appendix E

The Element of Materiality

Defense trial counsel contended that proof of the foregoing events shed light on the question of materiality, in that Siegel was recalled and Mary Manna and Miss Shapiro were called before the grand jury in order to discredit Siegel and excuse Bolan for not disclosing his evidence to Judge DIMOCK and to punish Siegel for withholding a supposed "real story" about Matusow's recantation; and that this purpose of Bolan and Bailey was not material to the grand jury's investigation (SM 1151, 1458-59, 1487, 1541-49, 1552, 1564, 1583, 1638, 1641-42, 1644, 1648-50, 1653-54, 1670-73A, 1676-77, 1685-87, 2164).

Judge MCGOHEY refused all offers of proof to this effect and excluded the testimony thereon of Morris L. Ernst (SM 2162), Israel B. Oseas (SM 2480-81, 2857-58), Ernest Angell (SM 2717-20), Edward J. Ennis (SM 2730-33), and of Siegel himself (SM 2061-62), on the ground that motive is immaterial and materiality, being for the Court, is not a subject for contested proof (SM 1052-53).

Notwithstanding the statement in the opinion of affirmance by the Court of Appeals (Appendix A p. 5) that "Conceivably the omitted passages, if followed up, by cross-examination, might have led to relevant disclosures," the fact is that Gloria Swanson, Lewis L. Bredin and Michael Shore were all identified to the grand jury before it indicted petitioners, all testified before that grand jury, and all testified at the subsequent trial, where they were examined and cross-examined; none of them knew anything relevant or had anything to disclose. (Consult excerpts at 153a-156a and SM 991 and 1006-1010.)

Appendix E

The Prosecutor's Summation to the Jury

Although Siegel and Miss Shapiro had been called before a grand jury which was investigating the recantation of Harvey Matusow, there is no question at all that these petitioners had been in no way connected with Matusow's recantation. At the time of their sentencing on February 18, 1958 the following colloquy occurred between Judge McGohey and Arthur B. Kramer, Assistant U. S. Attorney in charge of the prosecution:

"The Court: Well, since you raise that question, Mr. Kramer, and advise the Court that in your opinion motive is germane, I think you might explore that a little bit more and indicate to me, if you think the record supports it, any evidence which would indicate that there was any motive here to hide any possible connection, if there was any, and the evidence showed none, with a conspiracy to help Matusow in connection with his recantation.

"Mr. Kramer: No, your Honor, that has never been the Government's contention and your Honor is quite correct in stating there is no evidence in the record to support any—

"The Court: I have searched the record since the trial pretty carefully to see if there is any indication of that, and I find none whatever. On the contrary, I find that in so far as any of the evidence related to that, it shows complete absence of any such intention on the part of either of these defendants to contribute in any way to whatever Matusow did in connection with his participation in the Flynn trial, and his recantation of his testmony.

"Mr. Kramer: I quite agree with that, your Honor. . . ." (SM 3236-37).

And again, during defense counsel Ten Eyck's argument upon sentencing, this colloquy occurred:

"The Court: Oh, no, you misunderstood me. What I said was that as far as I could recall—and Mr. Kramer agreed with me—there was nothing in this record to justify an inference by this Court on the question of sentence that either of these defendants was motivated or had contributed in any way to any conspiracy of which Matusow may have been a member in order to vitiate the convictions which had been obtained in the Flynn case or to cause his recantation" (SM 3249).

• • • • • •

"The Court: Well, the point is that neither in Judge Dimock's finding nor in the Senate finding was there anything to implicate either of these defendant's in any of the matters which the Court and the committee found to relate to them" (SM 3266).

• • • • • •

"The Court: Well, that, I think, is the most telling point, that the testimony of the defendants with respect to what was in their minds when they did this has not been counteracted by any evidence offered by the Government, and furthermore, in so far as the record discloses there were no other persons at any time at any of these meetings other than the Colonel Bredin and Miss Swanson and Shore—

"Mr. Ten Eyck: That's right, and in that connection I would like to advert to this in passing: All three of those people testified before the Grand Jury, and there is no suggestion, in fact the contrary is suggested by the record, that any of them knew anything that

would help the Grand Jury in its Matusow investigation; or knew anything about Matusow's record as a witness.

"The Court: Well, that may be so, but I don't think that that is important" (SM 3267-68).

From the outset of the trial the Government had taken the position that motive and intent are two separate matters and that motivation is wholly irrelevant and immaterial (SM 44-45, 1898, 1900-1907). Judge McGohey expressed his agreement with this position of the Government (SM 1898, 1907).

Notwithstanding all of the foregoing (which took place on February 18), on January 16 in his summation the Assistant U. S. Attorney had said:

"Mr. Kramer: All right. Well, perhaps in discussing this question of motive, which again I submit to you is really immaterial and should not enter into your considerations, you may be concerned about what did motivate Siegel to do—Siegel and Shapiro to do what they did.

"Well, they have had at least two explanations, and we may not have the real one yet. There may have been some information in these memoranda that was damaging to Siegel personally. Maybe he wanted to keep that secret. He told Mr. Bolan at the time that he was under questioning in this office another reason, and perhaps this is a possible reason. I am not suggesting it as the reason, but this is another possible reason, that his contacts with Matusow were not as innocent as he would now have you believe. Certainly he spent a good deal of time with Matusow. We know that he had dinner with him or that he was with him

on two occasions at the Blair House. From Shore's testimony we know that he invited Matusow to have dinner with him on one occasion at the Blair House. Certainly this wasn't a relationship of a man who thought he was dealing with a crackpot. Siegel was just a little bit too anxious on his first trip, first occasion before the Grand Jury to tell everybody how he spotted Matusow as a nut from the beginning. I mean, he was too anxious.

"Now, in 1955, when he testified, Matusow had sudden[d]ly fallen from favor. You know prior to that time he had worked for the McCarth[t]y Committee, he had been used as a Government witness, and I suppose he had a certain amount of usefulness.

"The Court: Pardon me, Mr. Kramer; do you really think it is worthwhile to go into that? You have argued to this jury that it has no bearing on this at all, that intent does, but not motive, and now you are substituting a whole series of motives which you apparently want the jury to consider. I think that is improper" (SM 2972-2974).

"Mr. Kramer: • • •

"That reason was developed after the fat was in the fire. That something that they have now dreamt up and they dreamt up in the days following March 20th to excuse an inexcusable act.

"As I have contended throughout the trial and as I believe his Honor will instruct you in his charge, there is a difference between motive and intent. These people intended to do precisely what they did. Both of them are lawyers. They are intelligent people.

"One of them has been practicing for more than 25 years. This isn't a case of a confused person. The

very acts they did, the very lies they told they realized at the time were lies. That has been admitted, and the fact that they had a good reason for doing it is simply no excuse.

"If I can put a rather homely example, I suppose if somebody went out and stole a sum of money and was brought to court and charged with the stealing, and it was shown that he had stolen the money, it would be no defense—

"Mr. Rassner: That is objected to, your Honor.

"The Court: Overruled.

"Mr. Kramer: —it would be no defense whatever for the defendant to say, 'Yes, I stole, but I did it because I wanted, I needed to get some money to feed my sick child.'

"All right, that may be why he did it. That may be a good motive, or what he considered to be a good motive, but it does not excuse the theft. And in the same sense I say that the reason that these people did what they did does not excuse what they did, if they knew at the time they were doing what they were doing, and I say on the evidence in the case there is just no question that they did this deliberately, this concerted action, as demonstrated by what occurred on March 21st, by the defendant Siegel's testimony on March 17th" (SM 2956-58).

* * * * * *

"Well, let's suppose that the motive—that there was some basis for this claim that all that they eliminated was the names of clients from these memoranda, and let's examine that claim for a moment.

"I say in the light of what we now know it is an incredible claim. • • • " (SM 2958-59).

• • • • • •

"But let's just examine this claim that they were trying to protect clients of Siegel. • • •

"Why did they do it? Because they did not want Miss Swanson's name to come before the jury, to come out in the open. Now, that is just poppycock. • • • But there was no conceivable reason for falsifying that particular record, certainly not the reason that the defendants now give. I say that it is something that has been recently conceived to excuse what we contend is an inexcusable series of acts" (SM 2925-60).

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No. 828

In the Supreme Court of the United States

OCTOBER TERM, 1958

K. LAWRENCE SIEGEL AND HADASSAH R. SHAPIRO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 263 F. 2d 530. The opinion of the District Court, per Bryan, J. (Pet. App. B; R. 3485-3509), denying petitioners' pre-trial motion to dismiss the indictment is reported at 152 F. Supp. 370. The unreported opinion of the District Court, per Dawson, J. (R. 3472-3474), on petitioner's motion for a bill of particulars is printed as Appendix C to the petition. The unreported opinion of the District Court,

per Clancy, J. (R. 3470-3471), denying other pre-trial motions made by petitioners is printed as Appendix D to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1959. On March 18, 1959, an order was entered by Mr. Justice Harlan extending the time for filing the petition for certiorari to and including April 10, 1959. On April 10, 1959, an order was entered by Mr. Justice Brennan granting an additional extension of time for filing the petition to and including April 11, 1959. The petition was filed on April 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination of the materiality of testimony upon which a charge of perjury under 18 U.S.C. 1621 is based is a question for the court or the jury.

2. Whether the petitioners' admittedly false answers to questions before a grand jury were material.

3. Whether the prosecutor was guilty of prejudicial misconduct in his remarks to the jury during summation.

4. Whether the trial judge committed reversible error in his charge to the jury, his refusals to charge as requested, and in his rulings and conduct in the course of the jury's deliberations.

STATUTES INVOLVED

The statutes involved are set forth in the petition, pp. 5-6.

STATEMENT.

A twelve-count indictment (R. 3290-3310) was returned by a Federal grand jury in the District Court for the Southern District of New York on July 13, 1955, against the petitioners, R. Lawrence Seigel and Hadassah R. Shapiro charging them with conspiracy to obstruct justice, with obstruction of justice in violation of 18 U.S.C. 1503 and with perjury in violation of 18 U.S.C. 1621. The offenses charged in the indictment related to the destruction by the petitioners of original memoranda (and the stenographic notes from which the memoranda were prepared) of conversations, in 1954, between Mr. Siegel and one Harvey M. Matusow; the substitution therefor of altered memoranda and stenographic notes; the false testimony of the petitioners regarding the authenticity of the substituted memoranda; and their alleged corrupt influence on the testimony of another witness before the same grand jury.

A trial by jury was commenced on December 16, 1957. The jury returned verdicts of guilty on all six of the perjury counts and on three of the obstruction of justice counts, but acquitted on one conspiracy count and two obstruction of justice counts (R. 3207). On February 18, 1958, the trial judge imposed upon Mr. Siegel suspended sentences and placed him on probation for a year and a day on each of the seven counts on which he was convicted, the sentences to run concurrently. In addition, he imposed a fine of $500 upon each of the four perjury counts (R. 3653). Miss Shapiro received suspended sentences on all five of the counts on which she was convicted, and was placed on probation for one year, the sentences to run concur-

rently [1] (R. 3654). On appeal to the Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (263 F. 2d 530; Pet. App. A).

The evidence adduced by the Government may be summarized as follows:

In January, 1955, Harvey M. Matusow, a former Communist and F.B.I. informant who had testified as a Government witness in two trials involving charges against Communists[2] swore, in two affidavits filed in support of motions for a new trial made by the defendants in those cases, that his testimony as a Government witness had been false. Moreover, in his affidavit filed in one of the cases,[3] Mr. Matusow swore not only that his testimony was false, but that a former Assistant United States Attorney, Roy M. Cohn, had known it to be false and had helped him fabricate it (R. 112-114).

Mr. Matusow's about-face led to the impanelling of

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[1] As a result of their perjury convictions, the petitioners, who were attorneys authorized to practice in the State of New York (R. 1806-1808, 2329), were automatically disbarred pursuant to Section 90(4) of the New York Judiciary Law. An attempt by petitioners to obtain review of this action by the State of New York is presently pending before this Court. *Rubin L. Siegel and Hadassah R. Shapiro, Attorneys* v. *The Association of the Bar of the City of New York*, No. 773, this Term.

[2] In 1952, Mr. Matusow testified for the Government in the Smith Act trial of Elizabeth Gurley Flynn and twelve other Communists in the District Court for the Southern District of New York. The trial resulted in the conviction of all thirteen defendants. See *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909. In January 1954, he testified against Clinton E. Jencks who was tried and convicted in the District Court for the Western District of Texas for filing a false non-Communist affidavit in violation of 18 U.S.C. 1001. See *Jencks* v. *United States*, 226 F. 2d 553 (C.A. 5) reversed, 353 U.S. 657.

[3] *United States* v. *Flynn*, 130 F. Supp. 412 (S.D. N.Y.).

a grand jury in the Southern District of New York on February 8, 1955 (R. 112), to determine the truth or falsity of his testimony and subsequent recantations. Specifically, the scope of its investigation was to determine whether Mr. Matusow had testified falsely as a Government witness in the *Flynn* and *Jencks* cases, and, if so, whether Mr. Cohn had been an instigator of perjury in the *Flynn* case; or whether, on the other hand, Mr. Matusow's recanting affidavits were false, and, if so, whether others had conspired to induce him falsely to recant (R. 115-117, 1035, 1097-1098). As part of its investigation into these matters, the grand jury questioned persons who had had contact with Matusow in the interval between his appearances as a witness and his recantations to learn whether he had ever told anyone during this period that he had given perjured testimony as a Government witness (R. 117-118, 1134).

Among the witnesses called was Mr. Siegel, a lawyer, who testified freely with respect to seven conversations with Mr. Matusow (R. 403-435). He indicated that he had dictated contemporaneous memoranda concerning these talks and was asked to produce them (R. 430-432). Instead he prepared a "chronological memorandum" of the information, discrepancies between which and his testimony led to a renewal of the request that he produce the memoranda (R. 1102, 1105, 1157-1160, 1163, 1180).

During the week preceding Mr. Siegel's second appearance before the grand jury, he, together with Miss Shapiro, an attorney in his office who also acted as his secretary, destroyed at least four of the original memoranda and prepared others in their place dating

them with the dates of the original memoranda (R. 654-655, 693, 695, 767). On March 17th Mr. Siegel appeared before the grand jury and produced these substituted memoranda (G. Ex. 32; R. 484-486) testifying, *inter alia*, that those dated April 21st, May 3rd and June 18th, had all been typed at or about those dates in 1954, and that he "couldn't say" when the November 3rd memorandum had been typed (R. 492, 493-498; G. Ex. 3). He also testified that the memoranda he had produced were "exactly what * * * [he] had told * * * [Miss Shapiro] and dictated to her at the time." (R. 493-494). Contrary to his testimony, however, and as he was later to admit, the April 21st, May 3rd, and June 18th memoranda which he produced were not typed at or about those dates. As Mr. Seigel knew, all of these as well as the November 3rd memorandum had been retyped within a week preceding his March 17th grand jury appearance (R. 676-677, 691, 767) and, in the process of retyping, material had been purposefully and willfully eliminated.

On Saturday, March 19th, the Assistant United States Attorney telephoned Mr. Siegel to inform him that the grand jury desired to question the persons to whom he had dictated the underlying shorthand notes from which the memoranda had been prepared. Miss Shapiro called the Assistant United States Attorney and informed him that she had found most of the notes; that she was the person to whom Mr. Siegel had dictated most of the notes; but that some had been dictated to a Mrs. Mary Manna (R. 1109-1110).

On Sunday, March 20th, Mr. Siegel, Miss Shapiro, and Mrs. Manna met at Mr. Siegel's apartment. Miss Shapiro had taken with her Mrs. Manna's notebook

containing the original notes for the April 21st memorandum (R. 613-614). The three undertook to fabricate shorthand notes to conform to the fictitious memoranda which Mr. Siegel had produced before the grand jury on March 17th. Mrs. Manna was instructed to remove the pages which contained the original notes from her notebook. These original pages were later destroyed by Mr. Siegel (R. 611-613). While Miss Shapiro read from a copy of the altered April 21st memorandum (R. 599), Mrs. Manna crammed new notes into a partially blank page in the same notebook (R. 888-890; G. Ex. 14). Mrs. Manna received instructions on what to tell the grand jury the next day if questioned concerning her rewritten notes (R. 611). On the same day, Miss Shapiro created other notes to conform to the June 18th and November 3rd memoranda and a portion of the "chronological memorandum" (R. 717-722).

On the following day, March 21st, all three appeared before the grand jury and gave false testimony about the authenticity of the shorthand notes which were produced that day (G. Exs. 9, 18, 22). Mr. Siegel testified that he had examined the shorthand notes the previous day and compared them with the memoranda and that "there were no variations in the transcripts" (R. 516). He also testified that there were additional notes which had not been typed and that the information contained in these additional notes had found its way into the chronological memorandum (R. 520). Miss Shapiro produced the fabricated notes (G. Exs. 15, 16, 17) and testified that they were the original notes for the June 18th and November 3rd memos and the additional notes which had not been typed (R. 577-581). She also produced Mrs. Manna's notebook containing

the fabricated notes (G. Ex. 14) and testified that the latter had typed the April 21st memorandum on or about that date (R. 560-563). Mrs. Manna then testified that the fabricated notes had been dictated to her on or about April 21st and that the notes produced were those which she had taken at that time (G. Ex. 18, p. 1238).

Later that same day (March 21st) the Assistant United States Attorney, in thumbing through Mrs. Manna's stenographic notebook, noticed that the notes for the April 21st memorandum were more cramped together than the other notes in the book. It was then that he began seriously to suspect that the notes and the memorandum had been recently fabricated. He called Mr. Siegel to inform him that the grand jury wished to examine Mrs. Manna further the following morning. At the same time he warned him that if his own testimony about the notes and memoranda had been false he should set the record straight without delay (R. 1113-1114).

In their subsequent grand jury appearances the petitioners admitted the destruction of the original documents and the fabrication of the substitutes, insisting, however, that the alterations in the substitutes were immaterial (G. Exs. 4, 10, 11, 12, 13, 26, 27, 28). Since the petitioners had destroyed the original memoranda it was difficult for the Government to prove the substance of material deleted other than that which was admitted. It appeared that the conversation between Mr. Siegel and Mr. Matusow on April 21, 1954, wherein the latter had discussed his career as a Government witness, had been represented in the substitute memoranda as having taken place entirely in Mr. Siegel's

office whereas, in fact, portions of it took place at a restaurant and at the Fifth Avenue apartment of Miss Gloria Swanson at which time Miss Swanson and a Mr Lewis Bredin were present (R. 676, 1624-1625, 1867-1869, 2809-2810). The June 18th fabricated memorandum had misrepresented the place where the conversation on that date had taken place as at Mr. Siegel's office rather than at the Blair House, a restaurant, and omitted reference to the fact that a Mr. Michael Shore was present and had examined and discussed with Mr. Matusow a manuscript of a book (later published under the title "False Witness") which Mr. Matusow was seeking to have published (R. 990-992, 2227). The proof established also that omitted from the fabricated memorandum of November 3rd was the fact that Mr. Matusow had called Miss Swanson in Dallas, Texas, and the substance of his conversation with her at that time—facts which had been contained in the original November 3rd memorandum (R. 644, 2222, 2382, 2408).

Miss Swanson, Mr. Bredin and Mr. Shore were clients of petitioner Siegel in his law practice (R. 988, 1867-1868; 2042, 2806-2807, 2808-2809, 2819, 2822). In his first appearance before the grand jury, on March 3rd, Mr. Siegel had volunteered that Mr. Matusow had once followed him to Miss Swanson's apartment and that Mr. Matusow had told him of calling Miss Swanson in Dallas (G. Ex. 2, pp. 751-752). In spite of the fact that Mr. Siegel had voluntarily informed the grand jury of these facts on March 3rd, however, both he and petitioner Shapiro persistently maintained thereafter that their motivation in doing what they subsequently did stemmed from a desire to protect from adverse publicity these clients who allegedly had

nothing to do with Mr. Matusow's recantations, and that their conduct was justified because they were bound by the attorney-client privilege to withhold the names of these clients (R. 605-607, 744, 2246-2250).

ARGUMENT

The suspended sentences which petitioners received on each of the counts upon which they were convicted were made to run concurrently and the fines which Mr. Siegel received were imposed only on the perjury counts (*supra*, pp. 3-4). Under these circumstances Miss Shapiro's conviction is sustainable if it was valid with respect to any one of the counts upon which she was convicted and, with respect to Mr. Siegel, it is necessary to consider only the validity of his conviction on each of the perjury counts. Cf. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105.

1. The petitioners contend (Pet. 16-23) that the trial judge, in treating the question of the materiality of their admittedly false testimony as one of law to be determined by the court, withheld from the jury's consideration a very important "fact" issue and deprived them of their constitutional right to a jury trial upon all elements of the crimes charged. We submit that the petitioners' contention is without merit.

It is a well-established principle that the issue of "materiality" of testimony in a prosecution for perjury is a question of law to be determined by the court and not by the jury. *Sinclair* v. *United States*, 279 U.S. 263, 298; *Carroll* v. *United States*, 16 F.2d 951, 954 (C.A.

2), certiorari denied, 273 U.S. 763; *United States* v. *Slutzky*, 79 F. 2d 504, 506 (C.A. 3); *Travis* v. *United States*, 123 F. 2d 268, 270 (C.A. 10); *Dolan* v. *United States*, 218 F. 2d 454, 457 (C.A. 8), certiorari denied, 349 U.S. 923; *Harrell* v. *United States*, 220 F. 2d 516, 518 (C.A. 5); *United States* v. *Alu*, 246 F. 2d 29, 32 (C.A. 2).

The cases cited by petitioners (Pet. 17) hold that the right to a trial by jury in criminal cases guaranteed by the Sixth Amendment precludes the trial judge from withholding from the jury's consideration issues of *fact* constituting one or more of the elements of the crime charged, even when the prosecution evidence is uncontradicted. Insofar as we have been able to determine, however, no case has held that a trial judge's direction to a jury based on a conclusion of *law* contravenes the Sixth Amendment. There can be no serious question, therefore, since it is well established that materiality in a perjury prosecution is a question of law (*supra*, pp 10-11), that the trial judge correctly withheld consideration of that question by the jury below (R. 3074).

There is no substance, moreover, to petitioners' additional contention that the trial judge committed prejudicial error in his application of the rule that "materiality" is a question of law to be determined by the court. The petitioners complain (Pet. 16, 17) merely that the trial court curtailed cross-examination and excluded independent evidence tending to impeach the testimony of government witnesses, that the grand jury wanted to interview all persons who had conversed with Mr. Matusow. This latter testimony however, was clearly collateral to the issue of materi-

ality. Since the determination of materiality was a matter for the court alone and there was abundant and undisputed proof of materiality, the trial judge did not err in limiting cross-examination on the details of how the grand jury went about its work. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. *Glasser* v. *United States*, 315 U.S. 60, 83; *Alford* v. *United States*, 282 U.S. 687, 694. Generally, his action will not be interfered with unless there has been a plain abuse of discretion. *United States* v. *Manton*, 107 F. 2d 834, 845 (C.A. 2); *Lindsey* v. *United States*, 133 F. 2d 368, 369 (C.A.D.C.). The trial judge properly forbade a prolonged fishing expedition into whether the grand jury has summoned for questioning every person who might have talked to Mr. Matusow and, if not, why not. Cf. *Claiborne* v. *United States*, 77 F. 2d 682, 690 (C.A. 8). This could only have served to confuse the jury without further enlightening the court or in any way impeaching the proof of materiality. There was plainly no abuse of discretion. Nor was there any error, as petitioners suggest (Pet. 16, 18) in the trial judge's determination of the materiality issue at the completion of the government's case. See *United States* v. *Alu*, *supra*, 246 F. 2d 29, 32; *Brown* v. *United States*, 245 F. 2d 549, 552-554 (C.A. 8).

2. Both the grand jury foreman and the Assistant United States Attorney testified that the grand jury was conducting an investigation to determine whether Mr. Matusow's trial testimony or his recantation affidavits were true, and, if the former, whether a conspiracy existed to induce him to recant (R. 115-117,

1035, 1097-1098). This testimony as to the scope of the grand jury investigation was not disputed at the trial, nor is any question now raised as to its accuracy. Since this was the undisputed subject matter of the grand jury's investigation, it is clear that the original memoranda and notes, which admittedly concerned conversations between Mr. Siegel and Mr. Matusow at which Mr. Matusow discussed his trial testimony, were intimately related to the issues under investigation by the grand jury and that the petitioners' testimony regarding the authenticity of these documents was "material".

Though petitioners admit that their answers regarding the authenticity of the memoranda and notes they produced before the grand jury were false, and were known by them to be false when the answers were given (Pet. 17, 27), they contend that these false answers (*i.e.*, that the papers produced were originals), as well as the truthful answers (*i.e.*, that the papers produced were recently retyped and rewritten copies of the originals, containing deletions), if they had been given, were immaterial (Pet. 27). This conclusion is bottomed on the assumption that it must necessarily be viewed as established, since there was allegedly no proof to the contrary, that the only matters deleted from the originals were those concerning petitioner Siegel's clients, Miss Swanson, Mr. Bredin and Mr. Shore. As the reasoning goes, since all three of these persons were later called before the grand jury and their testimony revealed that they were ignorant of any relevant information about Mr. Matusow, petitioners' false answers, even if they had gone undiscovered, would not have had the effect of depriving the grand

jury of any information relevant to its investigation, and thus were not material.

In its opinion affirming the petitioners' convictions (Pet. App. A), the court below refuted the theory that materiality is determinable only from the actual effect of the false answers upon the ultimate questions under investigation by the grand jury, by pointing out that such reasoning "substitutes the opinion of the witness for that of the tribunal as to the 'materiality' of the answer." "No matter how right the witness might be in believing that the answer would not contribute to the investigation", the court noted, "he was bound to leave that decision to the tribunal." (*Id.*, at pp. A5-A6). The court, per Judge Hand, reasoned further that (*id.*, at p. A5):

> The error of appellants' position is that they confuse the "materiality" of the question with the "materiality" of the answer, as though it was proof that the question was immaterial, if the answer would have been so.

and ruled that (*id.*, at p. A6):

> A question is "material," no matter what the answer may be, unless it appears by its terms that the answer cannot be "material."

The petitioners contend (Pet. 24-30) that this language "presents a hitherto unprecedented and radically unsound proposition, which ignores the text of the perjury statute and substitutes what is conceivable intellectually * * * for common law evidence of actual materiality" (Pet. 24). We believe that the court's

test of materiality is in harmony with the expressions of this Court and other federal courts on that subject.

In *Sinclair* v. *United States*, 279 U.S. 263, 298-299, this Court pointed out that the question of materiality in a prosecution for perjury "is not essentially different" from the question of pertinency in prosecutions for contempt of Congress under Section 102 of the Revised Statutes. Having equated "pertinency" to "materiality", the Court said:

> The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." * * *

In *United States* v. *Slutzky*, 79 F. 2d 504, 506 (C.A. 3), it was held that:

> The phrase "material matter" as used in the statute in referring to perjury means one that is legally capable of being proved in the cause * * *.

In *United States* v. *Henderson*, 185 F. 2d 189, 191 (C.A. 7), the court observed that "the actual effect of the false testimony is not the determining factor" in establishing materiality in perjury prosecutions. See also *United States* v. *Hendrickson*, 200 F. 2d 137, 139 (C.A. 7). And, in *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763, it was specifically held that:

> The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade

> the grand jury from pursuing its investigation * * *.

See also *United States* v. *Hirsch*, 136 F. 2d 976 (C.A. 2), certiorari denied, 320 U.S. 759; *Dolan* v. *United States*, 218 F. 2d 454, 458 (C.A. 8), certiorari denied, 349 U.S. 923; *LaSalle* v. *United States*, 155 F. 2d 452, 454 (C.A. 10).

Like the test formulated by the court below, the various tests of materiality expressed in these cases all refute the proposition that materiality of false testimony is established only if it is shown to have had an effect upon the ultimate issues to be determined by the tribunal. That the reasoning of the court below was in conformity with these recognized tests of materiality, especially the one expressed in the *Carroll* case, quoted above, is evidenced, moreover, by other language in the court's opinion (Pet. App. A, p. A6):

> If Siegel was right in supposing that a truthful answer could not have assisted the grand jury, no doubt it would be reasonable to temper the severity of the sentence, as Judge McGohey did in the case at bar. *But the eventual impertinence of what was concealed could not excuse preventing by false testimony the grand jury from deciding that question.* [Emphasis added.]

And, since the court below held that "'[i]n the case at bar it was enough to make Siegel's *testimony* 'material' as to the originality of the memoranda that the interviews between him and Matusow might have thrown light upon his recantation" (*ibid.*; emphasis added), it is clear that there is no substance to petitioner's contention (Pet. 25-27) that Judge Hand's reasoning ig-

nored the text of the perjury statute and confused the test for contempt with the test for perjury by emphasizing the materiality of the questions rather than the materiality of the answers.

In *Carroll* v. *United States, supra,* 16 F. 2d at 953, the court explained the nature of a grand jury investigation:

> Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation. * * *

When viewed in the light of the purpose of a grand-jury inquiry, it is abundantly clear that the Matusow grand jury had a right to insist both upon the production of the original memoranda and notes and upon honest answers to questions concerning their authenticity. The originals would have been useful either to corroborate or to impeach Mr. Siegel's oral testimony about his contacts with Mr. Matusow. Their destruction, and the lies intended to conceal the fact that the originals had been destroyed, thus tended "to influence, impede, or dissuade the grand jury from pursuing its investigation * * *." *Carroll* v. *United States, supra.*

3. The petitioners' additional contentions—that the Assistant United States Attorney misused the grand

jury which indicted the petitioners in deprivation of their constitutional rights (Pet. 31-35); that the petitioners were deprived of a fair trial by the allegedly prejudicial remarks of government counsel in summation (Pet. 36-40); and that the trial judge committed reversible error in his charge to the jury, his refusals to charge as requested, and in guiding the jury during its deliberations (Pet. 41-47)—are in our opinion wholly lacking in substance and, as characterized by the court below (Pet. App. A, p. A6), "too trivial" to require extended discussion.

a. The petitioners charge (Pet. 31-35) that Assistant United States Attorney Bolan misused the grand jury by recalling Mr. Siegel before it and questioning him after he had admitted his falsehoods, merely to discredit him by indicting him and thereby excusing the Government's alleged suppression of his evidence in the *Flynn* proceedings (Pet. 33) is unsupported by the record. The record reveals rather that Mr. Bolan's motive in pursuing the true facts about Mr. Siegel's memoranda and notes and making them known to the grand jury was to uncover what he had ample reason to suspect had been a "wilful and deliberate deception of the grand jury" (R. 1116). And, as a government attorney engaged in assisting a grand jury in its investigation, Mr. Bolan's conduct was not merely permissible but, in fact, the required conduct of an attorney aware of the duties and responsibilities of his position. Moreover, contrary to the petitioners' suggestion (Pet. 32), they were given ample opportunity during two and a half days of cross-examination of Mr. Bolan (R. 1125-1217, 1508-1585, 1589-1664) to convince the jury of his alleged bias and improper

motives. Obviously the latter were not convinced of this fact. The petitioners' present argument is no more than an attempt to relitigate an issue properly determinable by the jury.

b. There is likewise no merit to the petitioners' contention (Pet. 36-40) that they were denied a fair trial by the prosecutor's remarks during summation, allegedly misstating facts and imputing motives for the petitioners' actions which not only were not fairly inferrable from the evidence, but in direct contradiction to the only record evidence on the subject. Contrary to the petitioners' contention, there was evidence in the record (R. 1624) from which the prosecution could reasonably argue that there might have been material deleted from the original memoranda other than that relating to Mr. Siegel's clients and that his reason for destroying the originals may have stemmed from an intent to conceal his true relationship with Mr. Matusow. The summation accurately summarized the evidence and fairly rebutted defense arguments of good motive. The prosecutor was not guilty of prejudicial misconduct.

c. As to the petitioners' contention (Pet. 41-47) that the trial judge committed prejudicial error in his conduct of the trial, the Government's position is well summarized by the Court of Appeals, which in discussing this point below noted (Pet. App. A, p. A6):

> Nothing * * * could be more unwarranted than the charge that Judge McGohey was unfair or partial in his conduct of the trial. On the contrary he showed the utmost concern for the rights of the appellants whose strictures display an

entire misapprehension of the essentials of a judge's duties.

The court's charge was clear and fair from beginning to end. The trial judge took great pains to explain the nature of the charges and the applicable law (see R. 3043-3100). He admitted that his instruction to the jury, that petitioner Siegel's admission that his grand jury testimony concerning the April 21st memorandum was false was "equivalent to a plea of guilty" (R. 3077, 3078), was erroneous, and he cured the defect by a supplemental charge pointing out the elements of the crime which must be found by the jury (R. 3149-3150).

Notwithstanding the petitioners' contention to the contrary, moreover, the trial judge did not commit reversible error in his instructions to the jury during its deliberations. After he had honored a number of requests by the jury to clarify or give additional instructions on various points of his charge (R. 3164-3167, 3189-3190, 3191-3192) he refused to give further instructions requested by the jury after they had been deliberating for almost eight hours, on the ground that he was "unable to make it any clearer" than he had in his original instructions (R. 3196). His action in this respect was a matter of discretion. Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his judgment. *United States* v. *Bayer*, 331 U.S. 532, 536-537; *United States* v. *Center Veal & Beef Co.*, 162 F. 2d 766 (C.A. 2). Similarly, the honoring of a request by the jury to have made available to them the transcript of the court's charge rests in the complete

discretion of the trial judge. *Copeland* v. *United States*, 152 F. 2d 769 (C.A.D.C.), certiorari denied, 328 U.S. 841.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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R. LAWRENCE SIEGEL

—and—

HADASSAH R. SHAPIRO,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

Those who would condone these convictions find themselves unable to unite on a justification.

In the Court of Appeals the Government sought affirmance by misrepresenting its evidence. The Assistant U. S. Attorney who had tried the case made a vain effort to convince the Court of Appeals that the evidence showed that Miss Swanson, Colonel Bredin, and Mr. Shore possessed material information (withheld through deleting their names from memos), because they had *overheard the Matusow-Siegel conversations* about which Mr. Siegel testified before the grand jury on March 3, 1955.

The Court of Appeals could not accept this misstatement of the record (which the Solicitor General halfheartedly picks up at pp. 8 to 9), but produced its surprising anomaly in the law of perjury—that the immateriality of anything known by those whose names were deleted made no difference; deleting their names and swearing otherwise constituted material perjury because it is *conceivable* that under different circumstances the persons named might have knowledge of something—although in this case they had none.

Now comes the Solicitor General with a third view: anything which corroborates or contradicts the testimony of a grand jury witness is *ipso facto* material (pp. 16-17).

We respectfully remind the Court that petitioners faced none of these three contentions at their trial. (a) They had no opportunity at their trial to meet the Government's contention in the Court of Appeals because it was not made at the trial, where Miss Swanson, Colonel Bredin, and Mr. Shore as witnesses demonstrated their ignorance of anything material to the grand jury inquiry. (b) The rationale of the Court of Appeals was not, as the Solicitor General suggests at page 17, that a false grand jury statement may be material if it tends to impede the course of the investigation; it was, in the language of the opinion: "A question is 'material,' no matter what the answer may be, unless it appears by its terms that the answer cannot be 'material.'" (App. A, p. 6.) No advocate in this case and no court in any other case had ever before given the perjury statute such a construction.*

(c) The Government did not suggest to the Court of Appeals that anything corroborating or impeaching a grand

* Such a test of materiality requires the defendant to prove immateriality, subtly and unconstitutionally shifting the burden of proof. Cf. *Speiser* v. *Randall*, 357 U. S. 513 at 528.

jury witness is always material. Nor did the Court of Appeals, discarding the Government's arguments and finding a rationale of its own, give any consideration in its opinion to this contention.

Speaking of the memoranda which were Mr. Siegel's aide memoire, the Solicitor General now says (p. 17):

> "The originals would have been useful either to corroborate or to impeach Mr. Siegel's oral testimony about his contacts with Mr. Matusow."

All the evidence in the record shows that the originals would *not* have been useful either to corroborate or to impeach Mr. Siegel's oral testimony about his contacts with Mr. Matusow. Thus the ultimate question which would be before this Court upon the grant of certiorari would be whether to reverse these convictions on the evidence or affirm them on conjecture; for actually the hypothesis of the Court of Appeals that the memoranda "might have led to relevant disclosures" did not exist in real life or in the record of this case, as the Court of Appeals conceded in its own very next sentence. Taking the Court's observation in context it was (App. A, p. 5):

> "'Conceivably the omitted passages, if followed up, by cross-examination, might have led to relevant disclosures. However, we do not rest our affirmance of the convictions upon that possibility; on the contrary we will assume, *arguendo*, that the disclosure of the omitted passages would have contributed nothing to what the grand jury was seeking."

The evidence clearly shows that nothing in the original memoranda varied in substance from Mr. Siegel's testimony concerning the subject of the grand jury investiga-

tion, Matusow's recantation. Miss Shapiro, of course, did not testify at all on that subject. The memoranda being incapable of adding or subtracting credence to petitioners' testimony on the matter which was within the scope of the grand jury inquiry, false statements about the time or manner of preparing the memoranda were also incapable of affecting credibility on the issues before the tribunal.

Mr. Siegel's testimony about his meetings with Matusow was not based upon the memoranda. He testified before the grand jury from his independent recollection. Hence his private aide memoire themselves would not be admissible in evidence as corroboration. Having testified from a present memory and without using aide memoire, any false statements about aide memoire could also have no effect to bolster the testimony.

Siegel did *not* testify, "I have memoranda which *bear out* what I have said." At the beginning of his first grand jury appearance Mr. Siegel said:

> "I made notes from time to time of the things that we [Matusow and Siegel] talked about. I worked last night until about 11 o'clock; I think if you could give me another half day I could reconstruct from—I have a downtown and an uptown office—I could reconstruct from whatever notes we have, a picture of the things we talked about that I think would give you a complete picture. * * * " (Ex. 2, p. 722.)

Towards the end of that appearance, he testified:

> "Q. Do you say that if given more time you would be able to more fully reconstruct your contacts with Matusow—is that correct? A. Let me see: He wrote a poem to me, which he left at my office, which I should be able to find. Also, what I can do is this: I am pretty

sure that if we go through the girls' stenographic books, and all of my personal files, and perhaps THE NATION files, and my miscellaneous material, I should be able to do the following for you: To pinpoint precisely the days that I saw him, and to give you, I think, a reliable and correct chronological story of what the things were that we talked about when we met.

"Q. I don't think it is necessary that you come before the Grand Jury again for that purpose. If you will deliver that material to me, I think it would be all right, unless the Grand Jury would like to have it.

"A Juror: Did you keep notes of your conversations with Matusow?

"The Witness: I am in the habit of dictating memoranda on practically everything I do, qualified by this reservation: Sometimes you don't have the time in an office, particularly when you are engaged in litigation, to make all of the notes you want to make; but I am pretty sure I will have a creditable and complete picture to present.

"A Juror: Wouldn't that be subject to the reservation that if anything arises from your examination that is strongly at variance with anything that your recollection has caused you to say to us, that that might be brought before us?

"Mr. Bolan: Yes, subject to that reservation." (Ex. 2, pp. 747-748.)

The grand juror's request that Siegel examine his aide memoire was expressed in terms neither of possible impeachment nor of corroboration; but only in terms of the possibility that looking at the memoranda might refresh his recollection as to some material item omitted from his testimony, about which he would *return to the grand jury to give additional testimony*. There is not a shred of evi-

dence that the memoranda before revision contained anything of the sort.

No question has ever been raised as to the veracity of Siegel's testimony on March 3, 1955—when he fully described what Matusow had said to him during any of the conversations about Matusow as a Government witness.

Siegel was not indicted for misrepresenting the content of his talks with Matusow. No statement about Matusow by either petitioner was ever alleged to be false.

In these circumstances it could not bolster Siegel's testimony about Matusow (which, not being challenged, required no corroboration) to delete the names of and references to Miss Swanson, Colonel Bredin, and Mr. Shore from the aide memoire. Had they been produced without revision the aide memoire and the existing stenographic notes would not have contradicted anything Siegel had reported as to what he and Matusow had said to each other. As Judge McGOHEY said at the time of sentencing,

> "• • • • there was nothing in this record to justify an inference by this Court • • • that either of these defendants was motivated or had contributed in any way to any conspiracy of which Matusow may have been a member • • •.
>
> "• • • • the testimony of the defendants with respect to what was in their minds when they did this has not been counteracted by any evidence offered by the Government, and furthermore, in so far as the record discloses there were no other persons at any time at any of these meetings other than the Colonel Bredin and Miss Swanson and Shore—" (App. E, p. 32).

Protecting famous clients from newspaper notoriety may or may not be a lawyer's duty; petitioners thought that

it was. If they were mistaken or carried their view too far, the situation nevertheless fails to fit into the rule of *Slutzky, Hendrickson, Carroll, Hirsch, Dolan* and *La-Salle* cited by the Solicitor General. We submit that the Solicitor General has made a pallid last-minute effort to rescue these shaky convictions with the argument that the deceptions were committed to support Siegel's credibility.

The "credibility" theory of materiality was advanced in *United States* v. *Icardi*, 140 F. Supp. 383 (D. C. D. C. 1956). The Court, dismissing the indictment, said in answer to the Solicitor General's present view:

> "The court has not overlooked the Government's argument that the matters sought to be elicited by these six questions were material because, if Icardi had impressed the subcommittee with his credibility and had produced substantial corroborative evidence, the subcommittee might have concluded that he was innocent. In the face of the evidence that, as of the time he was questioned, Icardi's answers could have no effect upon the subcommittee's conclusions in the field of legitimate congressional investigation, this slim conjecture cannot support a finding by this court, as a matter of law, that Icardi's answers related to a material matter. Whether Icardi denied or confessed guilt by his answers, his testimony could not have influenced the subcommittee's conclusion on subjects which might be legitimately under investigation. . . ." 140 F. Supp. at 389.

Here, too, the memoranda and the answers about them could, at the time of questioning, have no effect on findings or conclusions in the grand jury's investigation of Matusow.

II.

The latest case on the subject, *People* v. *Matula*, 168 A. C. A. 899, 336 P. 2d 1000 (Cal. Ct. App. Mar. 19, 1959), strongly supports petitioners' contention that the District Court erred in not receiving all the relevant proof about materiality and in not submitting this issue of fact to the jury. In its decision, the California District Court of Appeal reversed a perjury conviction and granted a new trial on the ground that the trial judge's instruction to the jury that as a matter of law defendant's testimony was material, when the materiality of the testimony depended upon the existence of certain other disputed facts, deprived him of his right to trial by jury.

The trial judge in the *Matula* case made his ruling after the close of the prosecution's case, thus precluding further proof or argument on the issue of materiality. In its reversal, the Court of Appeal stated:

> "Conceding that materiality is a question for the court, we nevertheless believe that the trial judge, in making his determination thereof, is not at liberty to resort to something undisclosed outside of the record *or dispense with the necessity for competent evidence to support his finding;* but that he must submit to the jury the facts upon which he predicates his finding." 168 A. C. A. at 908, 336 P. 2d at 1009. (Emphasis added.)

Rejecting the contention that the trial judge could properly take judicial notice of facts rendering defendant's testimony material, the Court of Appeal concluded that:

> "The record does not disclose what he [the trial judge] had in mind when he made his finding of materiality.

how or in what manner he arrived at his conclusion, or the source of his information; nor does it reveal that defendant was apprised of the source or the circumstantial or probative facts under his consideration, *or that defendant was given an opportunity to meet, rebut or argue them.*" 168 A. C. A. at 911, 336 P. 2d at 1011. (Emphasis added.)

Respectfully submitted,

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